No. 89-386-CFX
Status: GRANTED

Docketed:
September 2, 1989

Title: Port Authority Trans-Hudson Corporation, Petitioner
v.
Patrick Feeney
and
Port Authority Trans-Hudson Corporation, Petitioner
v.
Charles T. Foster

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Lesser,Joseph

Counsel for respondent: Reilly,Peter M. J.

Entry	Date	Note	Proceedings and Orders
1	Sep 2 1989	G	Petition for writ of certiorari filed.
2	Oct 4 1989		DISTRIBUTED. October 27, 1989
3	Oct 4 1989		Brief of respondent Feeney in opposition filed.
4	Oct 30 1989		Petition GRANTED.
			**********
5	Nov 16 1989	G	Motion of petitioner to dispense with printing the joint appendix filed.
6	Nov 27 1989		Motion of petitioner to dispense with printing the joint appendix GRANTED.
7	Dec 14 1989	G	Motion of Council of State Governments, et al. for leave to file a brief as amici curiae filed.
8	Dec 15 1989		Brief of petitioner Port Auth. Trans-Hudson filed.
9	Dec 21 1989		Record filed.
		*	Certified copy of original record and proceedings received.
11	Jan 5 1990		SET FOR ARGUMENT MONDAY, FEBRUARY 26, 1990. (1ST CASE)
10	Jan 8 1990		Motion of Council of State Governments, et al. for leave to file a brief as amici curiae GRANTED.
15	Jan 15 1990		Brief of respondents Patrick Feeney and Charles Foster filed.
12	Jan 16 1990	G	Motion of Pan American World Airways, Inc., et al. for leave to file a brief as amici curiae filed.
14	Jan 16 1990	G	Motion of American Airlines, Inc., et al. for leave to file a brief as amici curiae filed.
13	Jan 18 1990		CIRCULATED.
16	Jan 22 1990		Motion of Pan American World Airways, Inc., et al. for leave to file a brief as amici curiae GRANTED.
18	Feb 15 1990	X	Reply brief of petitioner Port Authority Trans-Hudson Corp. filed.
17	Feb 20 1990		Motion of American Airlines, Inc., et al. for leave to file a brief as amici curiae GRANTED.
19	Feb 26 1990		ARGUED.

89-386

Supreme Court, U.S.
FILED
SEP 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PORT AUTHORITY
TRANS-HUDSON CORPORATION,
Petitioner,

– against –

PATRICK FEENEY,
Respondent.

PORT AUTHORITY
TRANS-HUDSON CORPORATION,
Petitioner,

– against –

CHARLES T. FOSTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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86P

QUESTIONS PRESENTED

1. Is the Petitioner, Port Authority Trans-Hudson Corporation, a wholly-owned subsidiary of the Port Authority of New York and New Jersey, an agency of the States of New York and New Jersey, created by interstate compact to which Congress consented, prevented from interposing Eleventh Amendment immunity from suit in federal court against a claim brought pursuant to the Federal Employer's Liability Act simply because such a judgment would not be paid out of general state tax revenues?

2. Does a reference to federal judicial districts in the Port Authority suability statute's general purpose venue provision waive Eleventh Amendment immunity, in light of this Court's stringent standards for a finding of waiver?

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CHARLES T. FOSTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Port Authority Trans-Hudson Corporation, respectfully petitions for a writ of certiorari to review the judgments of the United State Court of Appeals for the Second Circuit in the above-captioned consolidated cases.

OPINIONS BELOW

The opinion of the Court of Appeals in *Patrick Feeney v. Port Authority Trans-Hudson Corporation* (App. A *infra*, A8-A21) is reported at 873 F.2d 628. The opinion of the District Court (App. A *infra*, A27-A44) is reported at 693 F.Supp. 34.

The opinion of the Court of Appeals in *Charles T. Foster v. Port Authority Trans-Hudson Corporation* (App. A *infra*, A24-A25) is reported at 873 F.2d 633. The District Court's opinion (App. A *infra*, A46-A50) is unreported.

JURISDICTION

The judgments of the Court of Appeals (App. A *infra*, A6-A7; A22-A23) were entered on April 26, 1989. The cases were consolidated by order of the Court of Appeals on May 9, 1989 (App. A *infra*, A5). A petition for rehearing was denied on June 6, 1989 (App. A *infra*, A1-A2). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

Portions of the Compact and subsequently enacted bi-State legislation, N.Y. Unconsol. L. §6101 *et seq.*; N.J.S.A. 32:1-1 *et seq.*, relied upon by the Court of Appeals below, are reproduced at App. B *infra*, A51-A55.

STATEMENT

The Port Authority of New York and New Jersey is a direct agency of the States of New York and New Jersey created by an interstate compact between them to which Congress consented (Ch. 154, Laws of N.Y., 1921; Ch. 151, Laws of N.J., 1921; 42 U.S. Stat. 174, 1921). The Port Authority, pursuant to the 1921 Compact and subsequently enacted bi-State legislation, operates various terminal, transportation, and other facilities of commerce in the statutorily defined Port District, including through its wholly-owned subsidiary, the petitioner Port Authority Trans-Hudson Corporation, the PATH interstate railway system. N.Y. Unconsol. L. §6601 *et seq.* (McKinney 1979 & Supp. 1988); N.J.S.A. 32:1-35.50 *et seq.* (West 1979).

The respondents in these consolidated cases are both employees of PATH, each of whom had sought damages pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §51 et seq. (1982). In each case, PATH moved pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings upon the ground that PATH enjoys Eleventh Amendment immunity from suit on FELA claims in federal court. The district court in each case granted PATH's motion.

The district court in *Feeney* held that under the reasoning of the Third Circuit in *Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir. 1987), *cert. denied*, ____ U.S. ____; 108 S.Ct. 344 (1987), the Port Authority was an arm of the state entitled to Eleventh Amendment immunity under the test laid down by this Court for determining such immunity – a finding which the district court found was fully applicable to PATH as the Port Authority's wholly-owned subsidiary (A43). In *Foster*, the district court

reached only the issue of waiver since PATH's status as a state agency had not been contested.

On the issue of waiver, both district courts examined the Port Authority's and, thus, PATH's suability statute to find that the statute contained neither an express nor an implied waiver of Eleventh Amendment immunity. Indeed, the district court in *Foster* examined the legislative history of the suability statute contained in the New York Legislative Annual and was able to conclude that the question of Eleventh Amendment immunity "was not addressed" (A49).

The Court of Appeals for the Second Circuit reversed both district courts, finding that PATH was not entitled to interpose Eleventh Amendment immunity, and remanded for further proceedings (A10, A18). The Court of Appeals held that the Port Authority and by extension PATH was not intended to be an agency for Eleventh Amendment purposes, although it acknowledged that the issue was, in its words, "close" (A16). The court also held that, in any event, the State Legislatures had both implicitly and explicitly waived Eleventh Amendment immunity in the Port Authority's suability statute (A16).

More specifically, the Second Circuit, in holding that PATH was not a state agency for Eleventh Amendment purposes, based its decision mainly on its determination that a monetary judgment against PATH would not be enforceable against New York and New Jersey (A14). The Second Circuit below deemed that factor to outweigh other indicators of state agency status named by the court, to wit: the method of appointment of Port Authority Commissioners and the gubernatorial veto over Port Authority actions (A15).

Second, the Court of Appeals held that the Legislatures of the States of New York and New Jersey had effected an "explicit waiver, *albeit* partial" (emphasis supplied) (A18) of Eleventh Amendment immunity by inclusion of a reference to federal judicial districts in the general purpose venue provision of the Port Authority's suability statute, reasoning that the reference to federal judicial districts otherwise would be meaningless (*Id.*). The Court of Appeals also held that there had been an implicit waiver of immunity in noting that the suability statute legislatively overruled, *inter alia*, the case of *Howell v. Port of New York Authority*, 34 F.Supp. 797 (D.N.J. 1940) which had held that the Port Authority was a state agency rather than a political subdivision, a "conclusion", the Court of Appeals reasoned, "that would support immunity under the Eleventh Amendment ...." (A17).

REASONS FOR GRANTING THE WRIT

POINT I

There Is A Direct Conflict Between The Second Circuit Below And The Third Circuit On This Issue Concerning The Very Same Agency.

The Second Circuit, in ruling that the Port Authority and, thus by extension, its wholly-owned subsidiary, Petitioner PATH, was not intended to be a state agency for Eleventh Amendment purposes, and further that, in any event, the State Legislatures had somehow both implicitly and expressly waived Eleventh Amendment immunity, has created a difficult and unusual situation. In view of the contrary Third Circuit decision in *Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey* (*PBA*), 819 F.2d 413 (3d Cir. 1987), *cert.*

denied, ____ U.S. ____; 108 S.Ct. 344 (1987), the identical bi-State agency finds itself whipsawed by different determinations of its amenability to suit in federal court by the two federal judicial circuits in which it lies. Moreover, because of this Court's recent decision in *Will v. Michigan Department of State Police*, ____ U.S. ____; 109 S.Ct. 2304 (1989), the Port Authority is a "person" within the meaning of Section 1983 in one circuit but not in the other. 109 S.Ct. at 2311.

The Second Circuit acknowledges that its decision has created a direct conflict, in its own words,[1] on a "close issue" between it and the Third Circuit's decision in *PBA*, which, applying this Court's test of *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), held that the Port Authority is an arm of the State which enjoys Eleventh Amendment immunity.[2] Furthermore, in *Leadbeater v. Port Authority Trans-Hudson Corporation (PATH)*, 873 F.2d 45, 49 (3d Cir. 1989), the Third Circuit specifically held that the very same language, found in the instant case to be an explicit waiver of Eleventh Amendment immunity, did not constitute a waiver under the stringent test established by this Court.

Petitioner respectfully submits that the decisions of the Third Circuit in *PBA* and *Leadbeater* correctly resolved

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[1] Significantly, the Second Circuit also stated that this conflict was one "that can be resolved only by the Supreme Court." (A15).

[2] The Second Circuit's decision also directly conflicts on this issue with the decision of the Third Circuit sitting *en banc* in *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 663 (3d Cir. 1989) wherein the Court endorsed and reaffirmed its prior holding in *PBA*, *supra*, that the Port Authority is a state agency entitled to Eleventh Amendment immunity.

the issues before it. In sharp contrast, the Second Circuit's decision below, insofar as it relies almost exclusively upon the ground that a judgment against PATH would not be enforceable either against the State of New York or the State of New Jersey, constitutes a fundamental misinterpretation of Eleventh Amendment jurisprudence. So, too, its finding of both an implicit and explicit waiver of Eleventh Amendment immunity flies directly in the face of the pronouncements of this Court that waivers of Eleventh Amendment immunity must be unmistakable and clearly expressed.

A. The Second Circuit Misapplied This Court's Precedent In Finding That The Port Authority Was Not A State Agency For Eleventh Amendment Purposes.

The decision of the Second Circuit purports to analyze the question of Eleventh Amendment immunity under the factors delineated by this Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, *supra*, and indeed, the court below grudgingly had to acknowledge that the case for immunity on the part of the Port Authority was stronger than it was for the agency before this Court in *Lake Country Estates*. Nevertheless, the Second Circuit went on to hold "that the Port Authority, and therefore PATH, is not a state agency for Eleventh Amendment purposes," based on one factor, to wit: whether a judgment against PATH would put the "state treasury" at risk of liability. (A12).

By holding that the potential liability of the state treasury "is the single most important factor" (A14) to a determination of state agency status for Eleventh Amendment purposes, it is respectfully submitted that the

Second Circuit has misapplied this Court's decision in *Lake Country Estates*. This Court has never held such factor to be the *sine qua non* for immunity. Indeed, in *Lake Country Estates*, in commenting on this factor as but one of the factors to be weighed, this Court made the simple observation that "some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself", 440 U.S. at 400-01 (footnote omitted). Nowhere in the *Lake Country Estates* opinion, however, is there any indication that this factor is, *by itself*, controlling.[3] *Cf. Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 n.11 (1984), where this Court noted that suits against the sovereign are found not only where the judgment "would expend itself on the public treasury", but also where the public administration would be interfered with or a judgment would either compel or restrain the government in its actions, citing, *Dugan v. Rank*, 372 U.S. 609, 620 (1963). In accord on this point: *Lewis v. Midwestern State University*, 837 F.2d 197, 199 (5th Cir. 1988), *cert. denied*, ____ U.S. ____; 109 S.Ct. 129 (1988); *Jensen v. State Board of Tax Commissioners*, 763 F.2d 272, 277 (7th Cir. 1985).

Quite obviously then, the Second Circuit's overemphasis on the "state treasury" factor represents a fundamental misinterpretation of Eleventh Amendment jurisprudence. The purpose of the Eleventh Amendment is not merely to protect "public" funds. If it were, cities or counties, whose funds are just as "public", would be entitled to invoke the

[3] Indeed, the court below had to acknowledge that the "state treasury" factor could not be "exclusively determinative" (A14). Yet, quite obviously, the court gave only lip service to this concept.

immunity. They are not. See, *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280-81 (1977); see also, *Fitchik*, 873 F.2d at 661. Rather, the Eleventh Amendment, as this Court has counseled time and again, is a recognition of state sovereignty as a limitation upon Article III judicial power.

Indeed, in *Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S. 459 (1945), the case most often cited for the importance of the "state treasury" factor, this Court's focusing on the potential liability of the state treasury was for the purpose of determining who was, in fact, the real party in interest since individuals were the nominal defendants. Thus, this Court held:

> "And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." (citations omitted) 323 U.S. at 464.

Similarly, in *Edelman v. Jordan*, 415 U.S. 651 (1974), *reh'g denied*, 416 U.S. 1000 (1974), cited by the Second Circuit for this proposition (A14), again the focus on the "state treasury" was for the purpose of identifying the real party in interest where state officials were the only named defendants.[4] Furthermore, both *Edelman* and *Ford* preceded

[4] The Court cites language in *Edelman* to the effect that:

> " '[T]he rule [that] has evolved [is] that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.' 415 U.S. at 663." (A14).

(Footnote continued)

Lake Country Estates with its specific test for Eleventh Amendment immunity.

That the protection of state treasury funds is not this Court's raison d'etre for Eleventh Amendment immunity is also well-established by the fact that the Eleventh Amendment is not necessarily a bar to such funds being expended in an award of attorney's fees. See, *Kentucky v. Graham*, 473 U.S. 159, 170-71 (1985); *Hutto v. Finney*, 437 U.S. 678, 695 (1978). Nor is the Eleventh Amendment a defense when these funds are expended in obedience to the dictates of an injunction mandating that state officials conform their conduct to federal law. See, *Quern v. Jordan*, 440 U.S. 332, 338 (1979); see also, *Milliken v. Bradley*, 433 U.S. 267, 289 (1977).

Thus, to the extent that the Second Circuit's decision focuses on the "state treasury" factor,[5] PATH respectfully

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While that proposition indeed is true, it does not necessarily then follow that if a judgment is not paid from the state's general tax coffers, Eleventh Amendment immunity cannot be found under *Lake Country Estates*, *supra*. Thus, at no time does PATH concede that the Port Authority's treasury, dedicated to state government purposes and legislatively constrained in its uses, is not a "state treasury" within the meaning of *Lake Country Estates*. See in this regard, the legislation establishing the Port Authority's General Reserve Fund, N.Y. Unconsol. L. §7002 (McKinney 1979); N.J.S.A. 32:1-142 (West 1979) which, in relevant part, dictates as follows:

> "Any surplus revenues not required for the establishment and maintenance of the aforesaid general reserve fund shall be used for such purposes as may hereafter be directed by the two said states."

[5] Another factor the court below cites as militating against the Port Authority's state agency status is that one provision of the Compact

(Footnote continued)

submits that it nevertheless is inappropriately applied to disqualify an entity like the Port Authority, which, as found by the Third Circuit, otherwise "functions as an agency of the state . . . ." *PBA*, 819 F.2d at 417.

Thus, the Second Circuit reluctantly acknowledged but two factors, i.e., method of appointment of commissioners by the states and the gubernatorial veto, as evidencing state agency status (A13-A14). In contrast, the Third Circuit in *PBA* listed a host of additional "significant indicia of state control over the Authority", to wit: the requirement of annual reports to the state legislatures, the requirement of legislative concurrence to changes in Port Authority rules and regulations, the requirement of express legislative authorization for Port Authority projects, as well as other factors establishing that "the Authority is a direct agency of the states . . . ." 819 F.2d at 417 – all evidently disregarded by the Second Circuit below.

In point of fact, far from stressing the "state treasury" factor, this Court's opinion in *Lake Country Estates*, is, perhaps, more properly read as generally emphasizing, not surprisingly in view of the Eleventh Amendment's deference to state sovereignty, the intention of the state in creating the agency. See *Pennhurst*, "we must be guided by '[t]he principles of federalism that inform Eleventh Amendment doctrine' ", *supra*, at 100, citing *Hutto*, 437

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describes the Authority as a "municipal corporate instrumentality", N.Y. Unconsol. L. §6459 (McKinney 1979) (A13, A54). However, "municipal corporate instrumentality" is but one of many terms that have been used to describe the Port Authority. See *PBA*, 819 F.2d at 414-15. Indeed, in *PBA*, the Third Circuit was able to note that the "long-standing judicial characterization of the Authority [as a state agency] has never been questioned by either state legislature despite the numerous opportunities to overrule these decisions. . . ." (matter in brackets added) 819 F.2d at 415.

U.S. at 691. Thus, this Court made clear that the task is to determine whether:

> "... there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose...." *Lake Country Estates*, 440 U.S. at 401.

See also, *Tuveson v. Florida Governor's Council on Indian Affairs*, 734 F.2d 730, 732 (11th Cir. 1984). The Third Circuit in *PBA*, *supra*, set out to do just that, and was able to conclude, after appropriately considering *all* the *Lake Country Estates* criteria that:

> "... although the Authority is no longer directly funded by the states, we conclude that the *history* of its financial structure, and the statutory constraints placed on the use of its funds, indicate that the Authority is considered an arm of the states by New York and New Jersey (emphasis supplied)." 819 F.2d at 416.[6]

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[6] In this regard, we note that the Second Circuit below has misinterpreted the Third Circuit's decision in *PBA* to the extent that it opined that the *PBA* holding was based on what it deemed to be an erroneous finding that two States were statutorily obligated to make appropriations should a judgment against the Port Authority deplete its resources (A15). That particular language in *PBA*, however, is just as consistent with a finding that the States, in carrying out their solemn obligations pursuant to the bi-State Compact, would make such an appropriation. In any event, the *PBA* decision in no way turns upon any such statutory obligation. In fact, the Third Circuit specifically noted that:

> "...the Authority's current funding structure *does not* provide conclusive evidence that the Authority is an agency of the state ....(emphasis supplied)" 819 F.2d at 416.

In sum, as the above cited language of *Lake Country Estates* makes plain, this Court has directed that the courts must ascertain the intent of the states in creating an agency when making a determination as to Eleventh Amendment immunity. In the case of the Port Authority, the requisite "good reason to believe" in that intent is self-evident. For irrespective of its modern fiscal structure or its current financial self-sufficiency, in creating the Port Authority in 1921, the States of New York and New Jersey, in fact, did create, and Congress consented to the creation of, an agency that was "totally immune from suit." *PBA*, 819 F.2d at 418; *accord*, *Howell v. Port of New York Authority*, 34 F.Supp. at 801; *Trippe v. Port of New York Authority*, 14 N.Y.2d 119, 123, 198 N.E.2d 585, 586 (1964).

B. The Second Circuit Ignored The Standards of This Court In Finding A Waiver of Eleventh Amendment Immunity.

As noted above, irrespective of the Port Authority's present financial self-sufficiency, in creating an entity totally immune from suit, the two states, by definition, intended to create an agency that shared their Eleventh Amendment immunity.

Thus, the question of whether PATH may interpose Eleventh Amendment immunity against a FELA claim devolves upon whether in 1951, some thirty years after the States created the Port Authority, the States waived Eleventh Amendment immunity in enacting the Port Authority's suability statute, N.Y. Unconsol L. §7101 *et seq*. (McKinney 1979) (A16).

The Second Circuit acknowledged that this Court's test for a waiver of Eleventh Amendment immunity is a stringent one:

> "We acknowledge that the standard for determining whether a state has waived its Eleventh Amendment immunity is strict. In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 (1985), *reh'g denied*, 473 U.S. 926 (1985), the Supreme Court stated that 'a State will be deemed to have waived its immunity "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction' " ' (citation omitted). *See also*, *Edelman v. Jordan*, 415 U.S. at 673." (A16).

Nevertheless, the Second Circuit somehow concluded, again in direct conflict with the Third Circuit in *PBA*, 819 F.2d at 418, as well as in *Leadbeater*, 873 F.2d 45, that the Legislatures both implicitly and expressly waived the Port Authority's Eleventh Amendment immunity in the suability statute.

The Court of Appeals seems to be saying that the Eleventh Amendment was implicitly waived by the Legislature's inclusion of a reference to *Howell* in the legislative history of the suability statute (A17). *Howell*, however, was merely one case included in a long list of cases, which the Court of Appeals had to concede "appears to be exclusively sovereign immunity cases" (*id.*) in which:

> "the courts concluded that in the absence of an express consent by the states to suit against the Port Authority, the Port Authority shared the governmental immunity of the states themselves." 1950 N.Y. Legislative Annual 204 (footnote omitted).

The court went on to find that since "*Howell* concluded that the Port Authority was a state agency rather than a

political subdivision" (A17), the States therefore must have intended to waive the Eleventh Amendment immunity characteristic of a state agency. The Second Circuit's conclusion thus flies directly in the face of the well-settled principle, recently reiterated by this Court, that "a State does not waive Eleventh Amendment immunity in federal courts merely by waiving sovereign immunity in its own courts" (citation omitted), *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 473-74 (1987).

This Court's recent decision in *Dellmuth v. Muth*, ____ U.S. ____; 109 S.Ct. 2397 (1989) further demonstrates that the Second Circuit's reliance below upon the Legislative Annual's reference to the overturning of *Howell* is misplaced. As this Court stated in *Dellmuth*, with respect to Congressional abrogation of Eleventh Amendment immunity, for which unmistakably clear language also is required:

> "In particular, we reject the approach of the Court of Appeals, according to which, '[w]hile the text of the federal legislation must bear evidence of such an intention, the legislative history may still be used as a resource in determining whether Congress' intention to lift the bar has been made sufficiently manifest.' . . . . Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met (citation omitted)." 109 S.Ct. at 2401.

Similarly, these stringent standards for finding a waiver of Eleventh Amendment immunity do not support the Second Circuit's holding below (A17-A18) that the Legislature's attempt in N.Y. Unconsol L. §7106 (McKinney 1979)[7] to restrict *venue* to federal district courts lying within the Port District was an "explicit waiver, albeit partial" (A18), of Eleventh Amendment immunity.

In Leadbeater, *supra*, the Third Circuit answered the very same contention, to wit: that providing for venue in the federal judicial districts demonstrates an intent to waive Eleventh Amendment immunity. In rejecting that argument, the Court of Appeals noted:

> "The defendant suggests, in opposition, that the provision for venue in certain federal districts is intended to apply to actions over which there is some basis for federal jurisdiction independent of the consent provisions. It is not apparent to us that the venue provision applies in such cases, where consent to suit is not required. *But whatever the purpose of this part of Section 32:1-162, we think the Supreme Court, by requiring proof of consent by 'overwhelming implication,' mandates that there be much more than inclusion of*

[7] The text reads in relevant part as follows:

> "The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district established by one of said states or by the United States, and situated wholly or partially within the Port of New York District. The port authority shall be deemed to be a resident of such county or judicial district . . . ." (A54-A55).

> *a reference to a federal judicial district in a venue provision*." 873 F.2d 45, 49.[8] (emphasis supplied)

The Third Circuit in *Leadbeater* clearly is correct. Whatever may be the efficacy of the Legislatures' attempt in §7106 to control the choice of *venue*,[9] it strains credulity to believe that the Legislatures intended to do something as momentous as waive a constitutionally-protected right *sub silentio* merely by including a reference to federal judicial districts in a general purpose *venue* provision.[10] Quite obviously, the Legislatures can be presumed to have known how to consent to suit in federal court had that been their purpose. In fact, the language of the Legislative Annual cited above makes it perfectly clear that the question of Eleventh Amendment immunity was not specifically addressed.

In this regard, we note that this Court just recently took occasion to reiterate in *Welch*, *supra*, that:

[8] In this regard, it should be remembered that the parameters of Eleventh Amendment immunity were far less well-settled in 1950 than they are now. Indeed, it wasn't until *Welch*, *supra*, that this Court clearly overruled a precedent of nearly 25 years standing, *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), to the effect that Eleventh Amendment immunity could be waived merely by a state participating in a Congressionally-regulated activity. *Welch*, 483 U.S. at 478.

[9] But see, *Brophy v. Consolidated Rail Corporation*, Civ. A. No. 85-4201, 1986 W.L. 11686 (E.D. Pa.).

[10] It is more than evident that the venue language of §7106 is neither a consent to nor a waiver of anything. The waiver of sovereign immunity is contained in §7101. The subsequent provisions of the suability statute for the most part serve to condition and limit that consent. See, generally, *inter alia*, *Trippe*, 14 N.Y.2d 119, 198 N.E.2d 585 (1964); *Luciano v. Fanberg Realty Co.*, 102 A.D.2d 94, 475 N.Y.S.2d 854 (1st Dept. 1984). Thus, there is no basis for the Second Circuit's finding that §7106 effected a "partial" waiver of Eleventh Amendment immunity.

> " '[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights,' *Edelman v. Jordan*, *supra*, 415 U.S., at 673, 94 S.Ct., at 1360." 483 U.S. at 473.

At bar, the court below had to concede that "use of the term 'venue' [in §7106] is somewhat anomalous in the Eleventh Amendment context" (A17). Thus, as the Third Circuit correctly determined in *Leadbeater*, *supra*, "somewhat anomalous" statutory language simply cannot satisfy the "express language" or "overwhelming implication" standards for Eleventh Amendment immunity established by this Court.

POINT II

This Case Presents an Important Issue of Law Which Has Engendered Considerable Confusion In The Courts of Appeals and Which, Therefore, Should Be Resolved by this Court.

As noted in Point I, *supra*, the conflict between the Second and Third Circuits has placed Petitioner PATH in a peculiar position – amenable to suit in one federal judicial circuit and not the other – a "person" within the meaning of §1983 in one jurisdiction and not in the other.

Obviously this untoward state of affairs with respect to a compact agency raises an important issue of public law which, as the Second Circuit itself recognized (A15), only this Court can resolve. In this regard we note this Court some time ago stated in another Eleventh Amendment matter:

> "The construction of a compact sanctioned by Congress under Art. I, § 10, cl. 3 , of the Constitution presents a federal question . . . Moreover,

> the meaning of a compact is a question on which this Court has the final say . . . ." *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 278 (1959).

Furthermore, in *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U.S. 419 (1940), cited in *Petty*, this Court recognized that:

> ". . . questions of the construction of the Compact between states and of the jurisdiction of this Court . . . [are] of public importance." 310 U.S. at 427.

Quite apart from the particular discomfiture of Petitioner, however, it is self-evident that there has been considerable confusion among the lower federal courts over the proper application of this Court's *Lake Country Estates* standards which has affected or might potentially affect a myriad of agencies. The conflict between the Second and Third Circuits in the instant case over the "state treasury" factor is but one, if not the most glaring, example of this confusion.

Thus, in *McDonald v. Board of Mississippi Levee Commissioners*, 832 F.2d 901 (5th Cir. 1987), the Fifth Circuit, citing its earlier decision in *Jacintoport Corp. v. Greater Baton Rouge Port Commission*, 762 F.2d 435 (5th Cir. 1985), *cert. denied*, 414 U.S. 1059 (1986), denied immunity to the Board, stating that:

> ". . . because an important goal of the eleventh amendment is the protection of states' treasuries, the most significant factor in assessing an entity's status is whether a judgment against it will be paid with state funds." 832 F.2d at 907.

However, just one year later in *Lewis v. Midwestern State University*, 837 F.2d 197, Point I, *supra*, another panel

of the Fifth Circuit rejected an argument that immunity could not exist because the judgment would be paid out of "non-state" funds. The Court noted:

> "We rejected a similar argument in *United Carolina Bank*. That case held that 'the eleventh amendment is not applicable only where payment would be directly out of the state treasury.' 665 F.2d at 560. Instead, the 'crucial question . . . is whether use of these unappropriated funds to pay a damage award . . . would interfere with the fiscal autonomy and political sovereignty of Texas.' *Id.* at 560-61." 837 F.2d at 199.

Similarly, in *Travelers Indemnity Company v. School Board of Dade County, Florida*, 666 F.2d 505 (11th Cir. 1982), *cert. denied*, 459 U.S. 834 (1982), the Eleventh Circuit Court of Appeals rejected a claim of immunity, noting:

> ". . . *Edelman* makes it clear that the Eleventh Amendment protection is available only if satisfaction of the judgment sought against the state 'agency' must under all circumstances, be paid out of state funds." 666 F.2d at 509.

Yet two years later in *Tuveson v. Florida Governor's Council on Indian Affairs, Inc.*, 734 F.2d 730, Point I, *supra*, that same Eleventh Circuit upheld a claim of immunity, holding:

> "Several courts of appeals have regarded the final actor, who ultimately pays, as the most crucial. This Court has stated the most important factor is how the entity has been treated by the state courts." (citations omitted) 734 F.2d at 732.

Moreover, it is respectfully submitted that firm guidance by this Court regarding what is the proper weight to be accorded to the "state treasury" factor will prevent in the future the fallacy the Fifth Circuit fell into in *Jacintoport, supra*, where in declining to reach the question of whether Eleventh Amendment immunity would exist if the defendant Port Commission could not satisfy the judgment, the court made a rather startling statement, to wit:

> "On the record before us, it appears that any judgment obtained by Jacintoport can be satisfied by the Commission itself . . . That record shows that even the most favorable estimation of Jacintoport's monetary damages does not reach a tenth of the Commission's surplus revenue in a 'good year' – of which it has had several recently. The State of Louisiana will not incur liability on this judgment's account. We specifically decline to reach the question of this Commission's immunity in an instance where the size and nature of the judgment sought would clearly result in liability for the state." 762 F.2d at 441.

With all due respect to the Fifth Circuit, as this Court held in *Lake Country Estates*, 440 U.S. at 401, an agency is either structured to be entitled to immunity or it is not. Sovereign immunity cannot be and simply is not a function of the size of the judgment being sought.

In view of the foregoing, it is clear that this case presents an important issue of public law engendering considerable confusion within and among the circuits and, thus, requiring resolution by this Court.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Granted.

Dated: New York, New York
August 31, 1989

Respectfully submitted,

JOSEPH LESSER
Attorney for Petitioner
Port Authority Trans-Hudson Corporation
One World Trade Center – 66N
New York, New York 10048
(212) 466-7361

On the Petition:
ARTHUR P. BERG
ANNE M. TANNENBAUM

APPENDIX

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixth day of June, one thousand nine hundred and eighty-nine.

PATRICK FEENEY,

Plaintiff-Appellant,

DOCKET NUMBER

v

88-7797

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Defendant-Appellee.

[Filed June 6, 1989]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellee Port Authority Trans-Hudson Corporation.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

United States Court of Appeals
FOR THE SECOND CIRCUIT
[Filed May 9, 1989]

Charles T. Foster, Plaintiff-Appellant, -against- Port Authority Trans-Hudson Corporation, Defendant-Respondent.	88-7924 NOTICE OF MOTION *state type of motion* for Consolidation with P. Feeney v. PATH, Doc. No. 88-7797

MOTION BY:

Port Authority Trans-Hudson Corp.
One World Trade Center-66N
New York, New York 10048
(212) 466-7361
Anne M. Tannenbaum, Esq.
for Counsel

Has consent of opposing counsel:
A. been sought? ☒ Yes ☐ No
B. been obtained? ☐ Yes ☒ No
Has service been effected? ☒ Yes ☐ No
Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b))
Has argument date of appeal been set:
A. by scheduling order? N/A ☐ Yes ☐ No
B. by firm date of argument notice? ☐ Yes ☐ No
C. If Yes, enter date: ____

OPPOSING COUNSEL:
Peter M.J. Reilly, Esq.
444 Main Street
P. O. Box 230
Islip, New York 11751
Peter M.J. Reilly, Esq.
of Counsel

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8) N/A

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No
If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:

Honorable Miriam Cedarbaum

Brief statement of the relief requested:

Consolidated with *Patrick Feeney v. Port Authority Trans-Hudson Corporation*, Docket No. 88-7797

Complete Page 2 of This Form

By: ***(Signature of attorney)***

/s/ Anne M. Tannenbaum

Signed name must be printed beneath

Anne M. Tannenbaum

Appearing for: ***(Name of party)***

Port Authority Trans-Hudson Corporation

Appellant or Petitioner:
☐ **Plaintiff** ☐ **Defendant**

Appellee or Respondent:
☐ **Plaintiff** ☒ **Defendant**

Date 5/1/89

ORDER

(Kindly leave this space blank)

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

/s/

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty sixth day of April, one thousand nine hundred and eighty-nine.

Present:

Hon. Amalya L. Kearse,

Hon. Ralph K. Winter,

Hon. Robert W. Sweet, DJ*

Circuit Judges,

PATRICK FEENEY,

Plaintiff-Appellant,
-v- 88-7797

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Defendant-Appellee.

[Filed April 26, 1989]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

The mandate consisting of the items below, has been received. /____/Opinion/____/Order /____/Statement of Costs. Rec'd by EF, Date 6-25-89. Team #2

Elaine B. Goldsmith,
Clerk

/s/

Art Heller,
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 711 August Term, 1988

(Argued February 8, 1989 Decided)

Docket No. 88-7797

PATRICK FEENEY,

Plaintiff-Appellant,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Defendant-Appellee.

B e f o r e: KEARSE and WINTER, *Circuit Judges*, and SWEET, *District Judge.**

Appeal from an order of the United States District Court for the Southern District of New York (Robert J. Ward, *Judge*) granting the defendant's motion for judgment pursuant to Fed. R. Civ. P. 12(c). We conclude that the immunity from suit in federal courts provided to the states by the Eleventh Amendment either does not extend to the defendant or has been waived. We therefore reverse.

---

*The Hon. Robert W. Sweet, United States District Judge for the Southern District of New York, sitting by designation.

RICHARD W. MILLER, Islip, New York (Peter M.J. Reilly, O'Hagan & Reilly, Islip, New York, of counsel), *for Plaintiff-Appellant.*

ARTHUR P. BERG, New York, New York (Joseph Lesser, Anne M. Tannenbaum, New York, New York, of counsel), *for Defendant-Appellee.*

WINTER, *Circuit Judge*:

The sole issue in this case is whether the Port Authority of New York and New Jersey ("Port Authority") is immune from suit in federal courts by virtue of the Eleventh Amendment.[1] We conclude that the Eleventh Amendment immunity either does not extend to the defendant or has been waived.

The appellant, Patrick Feeney, is an employee of the Port Authority Trans-Hudson Corporation ("PATH"), which operates rail facilities between New York and New Jersey and is a wholly-owned subsidiary of the Port Authority. Feeney brought this action for damages for personal injuries allegedly suffered in the course of his employment. He asserted these claims under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.* (1982), the Boiler Inspection Act, 45 U.S.C. §§ 22 *et seq.* (1982), and the Safety Appliance Act, 45 U.S.C. §§ 1 *et seq.* (1982). PATH moved pursuant to Fed. R. Civ. P. 12(c) for dismissal of the complaint for lack of subject matter jurisdiction on the ground that PATH enjoys immunity from suit in federal courts because of the Eleventh Amendment. Judge Ward granted PATH's motion, and Feeney appeals. Feeney claims that the Port Authority is not a state agency for Eleventh Amendment purposes and, in the alternative, that, if it is such a state agency, its Eleventh Amendment immunity has been waived.[2] We agree with both arguments and reverse.

The claim that the Port Authority is not a state agency for Eleventh Amendment purposes requires that we examine it in some detail. The Port Authority is "a body corporate and politic" created in 1921 by an interstate compact between New York and New Jersey. The compact was approved by the United States Congress. N.Y. Unconsol. Laws § 6404 (McKinney 1979) and N.J. Stat. Ann. § 32:1-4

(West 1963 & Supp. 1988). The Port Authority is to "be regarded as the municipal corporate instrumentality of the two states for the purpose of develoing the port [of New York] . . .," N.Y. Unconsol. Laws § 6459 (McKinney 1979) and N.J. Stat. Ann. § 32:1-33 (West 1963 & Supp. 1988), and is authorized to:

> purchase, construct, lease and/or operate any terminal or transportation facility within said district; and to make charges for the use thereof: and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it.

(footnotes omitted). N.Y. Unconsol. Laws § 6407 (McKinney 1979) and N.J. Stat. Ann. § 32:1-7 (West 1963).

The powers of the Port Authority are exercised by twelve commissioners, six being selected by each of the participating states. N.Y. Unconsol. Laws § 6405 (McKinney 1979) and N.J. Stat. Ann. § 32:1-5 (West 1963). The Commissioners' actions are in turn subject to veto by the governor of either state. *See* N.Y. Unconsol. Laws § 7151 (McKinney 1979) and N.J. Stat. Ann. §§ 32:2-6 *et seq.* (West 1963 & Supp. 1988). The compact states that "[t]he [P]ort [A]uthority shall not pledge the credit of either state except by and with the authority of the legislature thereof." N.Y. Unconsol. Laws § 6408 (McKinney 1979) and N.J. Stat. Ann. § 32:1-8 (West 1963). *See also* 1930 Report of the Att'y Gen. 124 (bonds issued by Port Authority are not obligations of the state of New York). In the event the Port Authority's revenues are inadequate to meet its expenses, each state is obligated only to "appropriate, in equal amounts, annually, for the salaries, office and other

administrative expenses, such sum or sums as shall be recommended by the [P]ort [A]uthority and approved by the governors of the two states, but . . . only to the extent of one hundred thousand dollars in any one year." N.Y. Unconsol. Laws § 6416 (McKinney 1979) and N.J. Stat. Ann. § 32:1-16 (West 1963). The Port Authority may not incur any obligations for such administrative expenses until such appropriations are made. N.Y. Unconsol. Laws § 6418 (McKinney 1979) and N.J. Stat. Ann. § 32:1-18 (West 1963).

We conclude that the Port Authority, and therefore PATH, is not a state agency for Eleventh Amendment purposes. In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the Supreme Court held that the Tahoe Regional Planning Agency ("TRPA"), a bi-state authority established by California and Nevada to regulate the development of the Lake Tahoe region, was not a state agency for purposes of Eleventh Amendment immunity. The Court stated:

> By its terms, the protection afforded by [the Eleventh] Amendment is only available to "one of the United States." It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power."
>
> If an interstate compact discloses that the compacting States created an agency comparable to

> a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the State themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment.

Lake Country, 440 U.S. at 400-01. (footnotes omitted).

In denying the TRPA the protection of the Eleventh Amendment, the Court cited the following factors: (i) the compact referred to the TRPA as a political subdivision of the states; (ii) six of the ten governing members of TRPA were appointed by counties and four by the states; (iii) TRPA's funding was provided by counties, not by the states; (iv) TRPA's function, the regulation of land, is traditionally a function of local, not state, government; (v) the states had no veto over the actions of the TRPA; and (vi) TRPA's obligations were not binding on the states. *Id.* at 401-02.

Taking factors (i)-(v) into account, it appears that the case for denying Eleventh Amendment immunity to TRPA was stronger than is the case for denying it to PATH. Favoring non-application of the Eleventh Amendment immunity to PATH is the fact that the compact between New York and New Jersey describes the Port Authority as a "municipal corporate instrumentality," N.Y. Unconsol. Laws § 6459 (McKinney 1979) and N.J. Stat. Ann. § 32:1-33 (West 1963), language consistent with its being a political subdivision. Moreover, the Port Authority is to be self-sustaining financially, and its functions are localized and focus only on the port of New York. Favoring application are the facts that all of the Port Authority Commissioners are appointed by

the states, and the governors of the two states have a veto over the Commissioners' actions.

We do not believe, however, that the differences between the Port Authority and the TRPA constitute the requisite "good reason," *Lake Country*, 440 U.S. at 401, to conclude that the Port Authority was intended to be a state agency for Eleventh Amendment purposes. In particular, we believe that factor (vi), whether liability will place the state treasury at risk, although not exclusively determinative, is the single most important factor. *See Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 38 (2d Cir. 1977); *see also* Comment, *Eleventh Amendment Immunity and State-owned Vessels*, 57 Tul. L. Rev. 1523, 1528 (1983) (in determining whether to extend the Eleventh Amendment to a state agency "[t]he essential, but not exclusive, test is whether a monetary judgment against the agency would be satisfied out of the state treasury") (footnotes omitted). In cases where doubt has existed as to the availability of Eleventh Amendment immunity, the Supreme Court has emphasized the exposure of the state treasury as a critical factor. In *Edelman v. Jordan*, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974), for example, the Supreme Court stated that "[i]t is . . . well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. . . . [T]he rule [that] has evolved [is] that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.* at 663 (citations omitted); *see also Lake Country*, 440 U.S. at 400-01.

We believe it clear that a judgment against PATH would not be enforceable against either New York or New Jersey. The Port Authority is explicitly barred from pledging the credit of either state or from borrowing money in any name but its own. Even the provision for the appropriation of

moneys for administrative expenses up to $100,000 per year requires prior approval by the governor of each state and an actual appropriation before obligations for such expenses may be incurred. Moreover, the phrase "salaries, office and other administative expenses" clearly limits this essentially optional obligation of the two states to a very narrow category of expenses and thus also evidences an intent to insulate the states' treasuries from the vast bulk of the Port Authority's operating and capital expenses, including personal injury judgments. No provision commits the treasuries of the two states to satisfy judgments against the Port Authority, therefore. We believe that this insulation of state treasuries from the liabilities of the Port Authority outweighs both the methods of appointment and gubernatorial veto so far as the Eleventh Amendment immunity is concerned.

We realize that our holding creates a conflict between ourselves and the Third Circuit regarding PATH, *see Port Authority Police Benevolent Ass'n, Inc. v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir.), *cert. denied*, 108 S. Ct. 344 (1987), that can be resolved only by the Supreme Court. That decision, however, was based on the Third Circuit's understanding that in the event that "a judgment were entered against the Authority that was serious enough to deplete its resources, the Authority would be able to go to the state legislatures in order to recoup the amount needed for its operating expenses." *Port Authority Police Benevolent Ass'n*, 819 F.2d at 416. To the extent that this statement implies that the states *must* make such an appropriation, it appears to be in error. Under the compact, states are obligated to provide funds for Port Authority administrative expenses up to $100,000 only if their respective governors approve the request. Judgments in the present action thus cannot lead to a depletion of state treasuries without gubernatorial consent.

Although we would normally be most reluctant to create a conflict with another circuit on a close issue, we believe that the issue is not close in light of legislation enacted by New York and New Jersey stating that the Port Authority may be sued *in federal courts*. Even if the Port Authority enjoys Eleventh Amendment immunity, therefore, it has been waived. We turn now to that issue.

In 1950 and 1951 New York and New Jersey respectively enacted legislation that "consent[ed] to suits, actions or proceedings of any form or nature at law, in equity or otherwise . . . against the [Port Authority] . . ." N.Y. Unconsol. Laws § 7101 (McKinney 1979) and N.J. Stat. Ann. § 32:1-157 (West 1963). "Venue" for actions against the Port Authority consented to by this legislation, which include actions sounding in tort, expressly includes the federal courts. N.Y. Unconsol. Laws § 7106 (McKinney 1979) and N.J. Stat. Ann. § 32:1-162 (West 1963). The provision states in pertinent part:

> venue in any suit, action or proceeding against the [P]ort [A]uthority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district.

We acknowledge that the standard for determining whether a state has waived its Eleventh Amendment immunity is strict. In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 (1985), *reh'g denied*, 473 U.S. 926 (1985), the Supreme Court stated that "a State will be deemed to have waived its immunity 'only where stated "by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." ' " (citation omitted). *See also Edelman v. Jordan*, 415 U.S. at 673.

PATH argues that the language of the legislation in question is not sufficiently explicit to satisfy the test set out in *Atascadero State Hospital* and *Edelman*. Relying upon the Supreme Court's statement that " '[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued,' " *Welch v. Texas Dep't of Highways and Public Transportation*, 107 S. Ct. 2941, 2946 (1987) (citation omitted) (emphasis in original), PATH argues that the legislation governing the Port Authority's amenability to suit merely reflects the states' intention to waive the Port Authority's claim to sovereign immunity rather than its claim to Eleventh Amendment immunity.

PATH's argument, however, focuses solely upon the provisions allowing suits to be brought against the Port Authority, N.Y. Unconsol. Laws § 7101 (McKinney 1979) and N.J. Stat. Ann. § 32:1-157 (West 1963), and simply ignores the language of the legislation quoted above that expressly states that such suits may be brought in federal courts. Moreover, what legislative history there is indicates that his result was consciously intended. The 1950 New York States Legislative Annual thus refers to *Howell v. Port of New York Authority*, 34 F. Supp. 797 (D.N.J. 1940) as a decision that Section 7106 was designed to overturn. 1950 New York State Legislative Annual 203-04. In *Howell*, the court granted a motion to dismiss based on sovereign immunity and the Eleventh Amendment. Although the decisions cited in support of the dismissal appear to be exclusively sovereign immunity cases, *Howell* concluded that the Port Authority was a state agency rather than a political subdivision, a conclusion that would support immunity under the Eleventh Amendment. 34 F. Supp. at 800-01.

We concede that the statute's use of the term "venue" is somewhat anomalous in the Eleventh Amendment context. We conclude, however, that the use of that term in

no way undermines our conclusion that the provision evidences an intent to allow the Port Authority to be sued in the designated federal courts and is thus an explicit waiver, albeit partial, of the Eleventh Amendment. If such an intent is not attributed to the provision, then the provision is entirely meaningless. PATH's sole attempt to give meaning to the language in question is to argue that it relates to actions that may be brought in federal court where Congress has abrogated the Eleventh Amendment. PATH has failed to provide specific examples of any such cases, however. In any event, this argument is wholly unconvincing. First, it is inconsistent with the Legislative Annual's reference to *Howell*. Second, where Congress has abrogated the Eleventh Amendment immunity, states hardly need pass legislation waiving that abrogated immunity and have no power to determine the proper "venue" for actions brought pursuant to the abrogation.

We conclude, therefore, that the statutory provision establishing "venue" for suits against the Port Authority in United States courts is a waiver of the Eleventh Amendment.[1]

Reversed and remanded.

FOOTNOTES

1 The Eleventh Amendment provides

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The Eleventh Amendment has been construed to prevent a state from being sued in federal court by one of its own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890).

2 Feeney also claims that Congress abrogated PATH's Eleventh Amendment immunity when it enacted the FELA. We disagree. The effect of the FELA on PATH's Eleventh Amendment immunity is governed largely by *Welch v. Texas Dep't of Highways and Public Transportation*, 107 S. Ct. 2941 (1987). In that decision, the Supreme Court stated that abrogation of a state's Eleventh Amendment immunity requires that Congress "express[] in unmistakable statutory language its intention to allow States to be sued in federal court . . . ," *Welch*, 107 S. Ct. at 2947, and a " 'general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.' " *Id.* (citation omitted). Applying this rationale to the Jones Act, the Court held that the statutory language extending that Act to " 'any seaman who shall suffer personal injury in the course of his employment,' . . . does not authorize suits against the States in federal court." *Id.* (citations omitted) (emphasis omitted).

The Court did not, however, limit its opinion to the Jones Act. Instead, it went on to overrule *Parden v. Terminal Railway of Ala. State Docks Dep't*, 377 U.S. 184,

reh'g denied, 377 U.S. 1010 (1964), a decision holding that Alabama had waived its Eleventh Amendment immunity when it decided to enter the railroad business subsequent to Congressional enactment of the FELA. The *Welch* Court clearly indicated that *Parden* should not be relied upon either to qualify or to limit the Court's deicision in *Welch*. The *Welch* Court thus was at pains to repudiate *Parden*'s conclusion that the FELA language applying it to "every common carrier by railroad" evidenced a Congressional intent to abrogate the Eleventh Amendment immunity. The Court stated that *Parden* reflected a "mistaken[] reli[ance] on cases holding that general language in the Safety Appliance Act . . . and the Railway Labor Act . . . made those statutes applicable to the *States*." *Welch*, 107 S. Ct. at 2947 (citations omitted) (emphasis added). The *Welch* Court further stated that " *Parden*'s discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law." *Id*. at 2948. Finally, the Court held that "to the extent that *Parden v. Terminal Railway, supra*, is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled." *Id*. (footnote omitted). Because the pertinent language of the FELA is no more specific than the language of the Jones Act regarding the Eleventh Amendment, a claim that the FELA abrogates PATH's Eleventh Amendment immunity is no longer sustainable.

3 PATH also relies on *Florida Dep't of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (per curiam), *reh'g denied*, 451 U.S. 933 (1981), which involved a suit brought by an association of nursing homes against an agency of the state of Florida. The association sought retroactive relief for the state's previous failure to reimburse the nursing homes as required by the state's participation in the federal Medicaid program. The

Supreme Court held that the Eleventh Amendment barred the suit. The Court stated that : (i) "the 'mere fact that a State participates in a program through which the Federal Government provides assistance . . . is not sufficient to establish consent on the part of the State to be sued in the federal courts' "; (ii) a "State's general waiver of sovereign immunity . . . 'does not constitute a waiver by the State of its constitutional immunity under the Eleventh Amendment from suit in federal court' "; and (iii) "the fact that the [State] agreed explicitly to obey federal law in administering the program can hardly be deemed an express waiver of Eleventh Amendment immunity." *Id*. at 150 (citation omitted). We fail to see the relevance of that holding in the context of a provision that expressly allows actions to be brought in federal courts.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of April one thousand nine hundred and eighty-nine.

Present: Hon. Amalya L. Kearse,
Hon. Ralph K. Winter, Circuit Judges.
Hon. Robert W. Sweet, District Judge.*

CHARLES T. FOSTER,
Plaintiff-Appellant,

-v.-

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Defendant-Appellee.

Docket No. 88-7924

[Filed April 26, 1989]

Appeal from the United States District Court for the Southern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

---

* The Hon. Robert W. Sweet, United States District Judge for the Southern District of New York, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

Elaine B. Goldsmith,
Clerk

by: Edward J. Guardaro,
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 704 August Term, 1988

(Argued February 8, 1989 Decided APR 26 1989)

Docket No. 88-7924

CHARLES T. FOSTER,
Plaintiff-Appellant,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Defendant-Appellee.

B e f o r e: KEARSE and WINTER, *Circuit Judges*, and SWEET, *District Judge*.*

Appeal from an order of the United States District Court for the Southern District of New York (Miriam G. Cedarbaum, *Judge*) granting defendant's motion for judgment pursuant to Fed. R. Civ. P. 12(c). We conclude that the immunity provided to the states by the Eleventh Amendment does not extend to the defendant. We therefore reverse.

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*The Hon. Robert W. Sweet, United States District Judge for the Southern District of New York, sitting by designation.

RICHARD W. MILLER, Islip, New York
(Peter M.J. Reilly, O'Hagan and Reilly, Islip, New York, of counsel),
for Plaintiff-Appellant.

ARTHUR P. BERG, New York, New York
(Patrick J. Falvey, Anne M. Tannenbaum, New York, New York, of counsel),
for Defendant-Appellee.

PER CURIAM:

This case raises precisely the same issue as that decided this day in *Feeney v. Port Authority Trans-Hudson Corporation*, No. 88-7797 (2d Cir. , 1989). We reverse and remand for the reasons stated in that opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK FEENEY,
Plaintiff,

– against –

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Defendant.

Judgment
87 Civ. 9256
RJW

[Filed August 12, 1988]

Defendant having moved for an order pursuant to Rule 12(c), Fed. R. Civ. P., and the said motion having come before the Honorable Robert J. Ward, U.S.D.J., and the Court thereafter on August 11, 1988, having handed down its opinion (#63009), granting defendant's motion for judgment on the pleadings and dismissing the action, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

DATED: NEW YORK, N.Y.
August 12, 1988

/s/ Raymond F. Burghardt
Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET
ON 8-15-88

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK FEENEY,
Plaintiff,

– against –

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Defendant.

Opinion
87 Civ. 9256 (RJW)

APPEARANCES

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KEITH E. HARRIS, ESQ.
of Counsel

Ward, District Judge.

Plaintiff, an employee of the Port Authority Trans-Hudson Corporation ("PATH"), has brought this action against the railroad pursuant to the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §51, the Boiler Inspection Act ("BIA"), 45 U.S.C. §22, and the Safety Appliance Act ("SAA"), 45 U.S.C. §1, for injuries arising from PATH's alleged negligence in maintaining safe working conditions. Defendant moves for judgment on the pleadings pursuant to Rule 12(c), Fed. R. Civ. P. For the reasons that follow, defendant's motion is granted.

BACKGROUND

On or about August 6, 1986, plaintiff avers he was injured at the PATH car shop in Jersey City, New Jersey. Plaintiff, seeking three million dollars in damages, alleges that his injuries resulted from the negligent and careless conduct of PATH's agents, servants, and employees in their railroad operations.

PATH operates an interstate commuter railroad between points in New York and New Jersey. It is a wholly-owned subsidiary of the Port Authority of New York and New Jersey. The Port Authority is a corporate body created by compact between the States of New York and New Jersey with the consent of the Congress of the United States.[1] PATH moves to dismiss pursuant to Rule 12(c), Fed. R. Civ.

[1] The Port Authority was created by an interstate compact entered into by New York and New Jersey in recognition of the fact that "the commerce of the Port of New York has greatly developed and increased and territory in and around the Port has become commercially one center or district." N.Y. Unconsol. Laws §6401 (McKinney 1979).

(Footnote continued)

P., on the ground that PATH, as a wholly-owned subsidiary of the Port Authority, is protected by the States' Eleventh Amendment immunity from suit in federal court without consent.

DISCUSSION

A motion pursuant to Rule 12(c), Fed. R. Civ. P., is designed to provide a means of disposing of cases when the material facts are not in dispute and judgment on the merits can be achieved by focusing on the content of the pleadings and any facts of which the court will take judicial notice. 5 Wright and Miller, *Federal Practice and Procedure* ¶1367 (1973). A motion for judgment on the pleadings may be made at any time after the pleadings are closed and can raise several of the defenses enumerated in Rule 12(b), Fed. R. Civ. P.

In this case, defendant is raising a 12(b)(1), Fed. R. Civ. P., claim of lack of subject matter jurisdiction in its 12(c), Fed. R. Civ. P., motion.[2] In evaluating a motion under Rule

The statute provides:

> It is confidently believed that a better corodination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the state of New York and New Jersey.

Id., at §6401.

[2] Defendant styles this motion as one for judgement [sic] on the pleadings on the ground that the pleadings do not give the court subject matter jurisdiction. Rule 12(c), Fed. R. Civ. P., is generally used to secure a dismissal of a case on the basis of the underlying substantive merits of the claims and defenses revealed in the formal pleadings.

(Footnote continued)

12(b)(1), the complaint as a whole will be construed broadly and liberally, but argumentative inferences favorable to the pleader will not be drawn. 5 Wright and Miller, *Federal Practice and Procedure* §1350 (1973). In addition, the burden of proof on a Rule 12(b)(1) motion is on the party asserting jurisdiction. *Id.* A case "should not be dismissed [under a 12(b)(1) motion] for want of jurisdiction except when it 'appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.' " *AVC Nederland B.V.* v. *Atrium Investment Partnership*, 740 F.2d 148, 152-53 (2d Cir. 1984) (quoting *Bell* v. *Hood*, 327 U.S. 678, 682 (1946)). *See Albert* v. *Carovano*, 824 F.2d 1333, 1337-1338 (2d Cir. 1987); *Guilini* v. *Blessing*, 654 F.2d 189, 193 (2d Cir. 1981); *Morabito* v. *Blum*, 528 F. Supp. 252, 260 (S.D.N.Y. 1981). Here, because Plaintiff's claim is immaterial and frivolous if sovereign immunity applies to PATH, the court must determine to what extent PATH is protected from suit in federal court by the Eleventh Amendment.[3]

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5 Wright and Miller *Federal Practice and Procedure*, §1367, at 685. When using Rule 12(c), courts have applied the same standards for granting the appropriate relief as they would have employed had the motion been brought under Rules 12(b)(1), (6) or (7), Fed. R. Civ. P. *Id.* at 638. Rule 12(c), Fed. R. Civ. P., is appropriate for the instant case because the instant motion can be determined solely on questions of law and statutory interpretation.

[3] The immunity created by the Eleventh Amendment is not a "personal" defense, but a limitation of the jurisdiction granted to the federal courts by Article III of the constitution. The limitation deprives federal courts of any jurisdiction to entertain such claims, and thus may be raised at any point in a proceeding. *Pennhurst State School Hospital* v. *Halderman*, 465 U.S. 89, 98 (1984).

I. The Eleventh Amendment

> The Eleventh Amendment to the constitution provides:
>
> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State.

U.S. Const. Amend. XI.[4]

A literal reading of the Eleventh Amendment would solely preclude suits against a state brought by citizens of a different state, or by a citizen of a foreign state. While the Amendment by its terms does not bar suits against a state by its own citizens, the Supreme Court has consistently held that an unconsenting state is immune from suits brought in federal court by its own citizens as well as by citizens of another state. *Edelman* v. *Jordan*, 415 U.S. 651, 662 (1974) (quoting *Hans* v. *Louisiana*, 134 U.S. 1 (1890)); *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U.S. 279 (1973).[5]

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[4] The adoption of the Eleventh Amendment was in response to *Chisholm* v. *Georgia*, 2 U.S. 419 (1793). In *Chisholm*, a citizen of South Carolina was allowed to sue the State of Georgia under the provisions of Article III. Justice Iredell dissented asserting that Article III had not been extended to change the common law rule that a sovereign state cannot be sued without its consent. The Eleventh Amendment was adopted in 1798, within five years of the *Chisholm* decision.

[5] As the Supreme Court concluded in *Hans* v. *Louisiana*, 134 U.S. 1, 16 (1890) "[t]he suability of a state without its consent was a thing unknown to the law," and, accordingly, the authors of the Constitution could not have intended to confer jurisdiction on the federal courts to entertain lawsuits brought by individuals against unconsenting states.

A crucial issue with respect to Eleventh Amendment immunity is determining when a state is a party in interest. It is well established that even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. *Edelman* v. *Jordan*, *supra*, 415 U.S. at 663. Without question, a lawsuit is brought against a state for Eleventh Amendment purposes whenever the state or one of its agencies or departments is named as a defendant. *See Alabama* v. *Pugh*, 438 U.S. 781 (1978) (*per curiam*). This principle has been expanded to include suits against federally chartered corporations since 1900. *Smith* v. *Reeves*, 178 U.S. 436 (1900). In *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), the Supreme Court stated:

> [W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

Id. at 464. Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. *Edelman* v. *Jordan*, *supra*, 415 U.S. at 663 (quoting *Great Northern Life Insurance Co.* v. *Read*, 322 U.S. 47 (1944)). *See also Trotman* v. *Palisades Interstate Park Commission*, 557 F.2d 35, 38 (2d Cir. 1977).

The complaint in this action lists PATH, a wholly-owned subsidiary of the Port Authority, as the sole defendant. In *Port Authority Police Benevolent Association, Inc.* v. *Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir. 1987), *cert. denied*, 108 S.Ct 344 (1987), the Third Circuit explicitly ruled that "the Port Authority is entitled to

Eleventh Amendment immunity." *See also Mineo* v. *Port Authority*, 779 F.2d 939, 949 (3d Cir. 1985), *cert. denied*, 478 U.S. 1005 (1986) (holding that the Port Authority should be treated as a state for Tenth Amendment purposes). In *Port Authority Police Benevolent Association*, *supra*, 819 F.2d 413, the Third Circuit dismissed an action brought pursuant to 42 U.S.C. §1983 against the Port Authority on the ground that the Port Authority enjoys sovereign immunity.[6] The Court reasoned that under the Supreme Court test to determine the Eleventh Amendment immunity of a bi-state entity set forth in *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the Port Authority enjoyed such immunity.[7] The Court concluded

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[6] Discussing immunity, the Court stated:

> First, the Port Authority's twelve commissioners are appointed by the governors of each state and confirmed by the state legislatures. . . . Second, the functions performed by the Port Authority – are state functions (construction, maintenance and operation of highways, bridges and tunnels). . . . Third, the actions of the Port Authority's commissioners are subject to veto by the governors of either state and the Authority must hand in annual reports. *Port Authority Police Benevolent Association, Inc.* v. *Port Authority of New York and New Jersey*, 819 F.2d 413, 417 (3d. Cir. 1987), *cert. denied*, 108 S.Ct. 344 (1987).

[7] The Third Circuit stated:

> We must determine whether such an interstate agency is an arm of the state immune from suit under the Eleventh Amendment, *See* U.S. Const. Amend. XI, or a "person" amenable to suit under section 1983. We conclude that, under the Supreme Court's decision in *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, . . . the Port Authority is entitled to Eleventh Amendment immunity. *Port Authority Police Benevolent Association, Inc.* v. *Port Authority of New York and New Jersey*, *supra*, 819 F.2d at 414.

that, for Eleventh Amendment purposes, the Port Authority must be considered an arm or alter-ego of the state.[8]

As a wholly owned subsidiary of the Port Authority, PATH is entitled to the privileges and immunities of the Port Authority, including Eleventh Amendment immunity of a state from suit in Federal Court. *See* N.Y. Unconsolidated Laws §6612 McKinney (1979) ("Such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions and activities."). Inasmuch as the claim against PATH is for a monetary damages award that could ultimately be paid from the state treasury, New York State is the real, substantial party in interest and the Eleventh Amendment is implicated. *See Farid* v. *Smith*, No. 86-2007, slip op. at 4311-4312 (2d Cir. June 22, 1988) (Eleventh Amendment bars suit against state agencies if the state is the real party in interest).

Notwithstanding that an entity is an arm of the state protected by Eleventh Amendment immunity, the entity under certain circumstances can nevertheless be sued in federal court. Such a suit is permitted if Congress abrogates Eleventh Amendment protection in a federal statute, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976), or if a state explicitly waives its immunity and consents to suit in federal

[8] The rationale for the Court's decision was that if a judgment were entered against the Port Authority that was serious enough to deplete its resources, the Authority would be able to go to the state legislatures in order to recoup the amount needed for its operating expenses. *See* N.J. Stat. Ann. 32:1-16 (West 1963); N.Y. Unconsol. Laws §6416 (McKinney 1979) (Compact Article XV). Accordingly, a judgment against the Port Authority could have some impact on the state treasury. *Port Authority Police Benevolent Association, Inc.* v. *Port Authority of New York and New Jersey*, *supra*, 819 F.2d at 416.

court. *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 238 (1985) (citing *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883)). Therefore, the court must determine whether in this case the FELA permits a suit against a state in federal court or whether New York State has specifically given consent for a federal lawsuit in PATH's enabling legislation.

II. Congressional Abrogation of Eleventh Amendment Immunity

The first way in which a state may be subject to suit in federal court is where Congress abrogates a state's immunity by exercising its legislative powers to enforce the substantive provisions of the Due Process Clause of the Fourteenth Amendment. *See Atascadero State Hosp.* v. *Scanlon*, *supra*, 473 U.S. at 242.

The Supreme Court most recently discussed the nature of such abrogation in *Welch* v. *Texas Department of Highways and Public Transportation*, 107 S.Ct. 2941 (1987). *Welch* held that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Id.* at 2945 (quoting *Atascadero State Hospital* v. *Scanlon*, *supra*, 473 U.S. at 242 (1985)). The Court went on to point out that, with respect to the Jones Act, the waiver of immunity must be unequivocal:

> It is true that the Act extends to "*[a]ny* seaman who shall suffer personal injury in the course of his employment," §33 (emphasis added). But the Eleventh Amendment marks a constitutional distinction between the States and other employers of seamen. Because of the role of the States in our federal system, "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."

Welch v. *Texas Dept. of Highways and Public Transportation*, *supra*, 107 S.Ct. 2947 (1937) (quoting *Atascadero State Hospital* v. *Scanlon*, *supra*, 473 U.S. at 246). The Court concluded that using the phrase "any seaman" did not express in unequivocal terms that it sought to include seamen employed by the state.

The Supreme Court in Welch explicitly overruled *Parden* v. *Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), the only significant case in which an employee of a state-operated railroad company was permitted to bring an action in federal court under the FELA absent unmistakably clear statutory language abrogating the state's sovereign immunity. In *Parden* v. *Terminal Railway of Alabama Docks Department*, *supra*, 377 U.S. 184, the Court reasoned that Congress evidenced an intention to abrogate Eleventh Amendment immunity by making the FELA applicable to "every common carrier by railroad while engaging in commerce between any of the several States." The Court concluded that the State of Alabama was therefore not protected by sovereign immunity.[9] *Id.* at 186. But in *Welch*, the Supreme Court acknowledged that the holding of *Parden* had subsequently been

[9] The court held:

> We think that Congress, in making the FELA applicable to "every" common carrier by railroad in interstate commerce, meant what it said. That congressional statutes regulating railroads whether they are state owned or privately owned is hardly a novel proposition. . . .
>
> If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal injuries under existing rules, railroad workers in interstate commerce should be provided with the right of action created by the FELA, we should not presume to

(Footnote continued)

placed in doubt: "Although our later decisions do not expressly overrule *Parden*, they leave no doubt that *Parden's* discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law." *Welch* v. *Texas Dept. of Highways and Public Transportation*, *supra*, 107 S.Ct. at 2948. The Court refused to extend the reasoning of Parden to "infer that Congress in legislating pursuant to the commerce clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution." *Id.* at 2948 (quoting *Employees* v. *Missouri Dept. of Public Health and Welfare*, *supra*, 411 U.S. at 285). Thus, to the extent that *Parden* v. *Terminal Railway*, *supra*, 377 U.S. 184, is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, *Parden* has been overruled.[10]

> say, in the absence of express provision to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act. To read a "sovereign immunity exception" into the Act would result, moreover, in a right without a remedy; it would mean that Congress made "every" interstate railroad liable in damage to injured employees but left one class of such employees — those whose employers happen to be state owned — without any effective means of enforcing that liability. We are unwilling to conclude that Congress intended so pointless and frustrating a result. We therefore read the FELA as authorizing suit in a Federal District Court against state-owned as well as privately-owned common carriers by railroad in interstate commerce.
>
> *Parden* v. *Terminal Railway of Alabama Docks Department*, 377 U.S. 184, 188-90 (1964).

[10] Even before *Welch*, the Supreme Court had expressed the view that *Parden* was no longer good law. The Court had frequently stated that

(Footnote continued)

Welch v. *Texas Department of Highways and Public Transportation*, *supra*, 107 S. Ct. at 2948.[11]

Accordingly, the phrase "every common carrier by railroad" in the FELA cannot be considered an unequivocal statutory intent to include a common carrier by railroad owned by a state. This conclusion has also been reached by federal courts in New Jersey which, relying on *Welsh*, have recently dismissed several FELA claims against state-owned railroads, the Port Authority and PATH on the ground that waiver to be sued cannot be implied in the FELA.

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an unequivocal expression that Congress intended to override Eleventh Amendment immunity was required. *See Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985); *Pennhurst State School Hospital* v. *Halderman*, *supra*, 465 U.S. at 99; *Quern* v. *Jordan*, 440 U.S. 332, 342-345 (1979). The *Welch* court concluded that consent is crucial to sue the state:

> Thus, despite the narrowness of the language of the Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally, and "it has become established by repeated decisions of the court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given . . . and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification."

Welch v. *Dept. of Highways and Public Transportation*, 107 S.Ct. 2941, 2950 (1987) (quoting *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 291-292 (1973)).

[11] Although PATH is involved in interstate commerce and railroad operations, a state does not waive its Eleventh Amendment immunity by merely participating in an activity funded or regulated by Congress. *See Edelman* v. *Jordan*, 415 U.S. 651 (1974). Waiver will not be inferred from participation unless Congress has made waiver a condition of participation. *See Atascadero State Hosp.* v. *Scanlon*, *supra*, 473 U.S. at 242.

In *Fitchik* v. *New Jersey Transit Rail Operations*, 678 F. Supp. 465, 469 (D.N.J. 1988), the court found that New Jersey Transit Rail Operations could not be sued pursuant to the FELA, or Federal Safety Appliance Act by an employee of the railroad because the state's absolute Eleventh Amendment immunity barred such suit. *See also Leadbeater* v. *PATH*, No. 86-5103, slip op. (D.N.J. April 13, 1988) (applying *Welch* to dismiss suit against PATH for lack of subject matter jurisdiction); *McIntosh* v. *Port of Authority of New York and New Jersey and Taglietta*, No. 86-2536, slip op. at 4 (D.N.J. April 6, 1988) (applying *Welch* to dismiss eight cases pending against PATH, the Port Authority and New Jersey Transit); *Rockwell* v. *New Jersey Transit Rail Operations*, 632 F. Supp. 280, 283 (D.N.J. 1988) (FELA does not set forth a clear and unmistakable intent on the part of Congress to abrogate a state's Eleventh Amendment immunity).

Thus, the first method of permitting a suit against a state in federal court, explicit waiver of Eleventh Amendment immunity by a Congressional statute, is not mandated by the language of the FELA.[12]

III. Waiver of Immunity by The State

The court must also examine the second way in which a state may be subject to suit in federal court. The principle of sovereign immunity can be limited by the state. Federal courts are free to entertain suits brought against states by individuals when the state has given its consent.

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[12] Although not raised by the parties, it is clear that neither the language of the SAA nor the BIA expressly abrogate Eleventh Amendment Immunity. *See McKenna* v. *Washington Metropolitan Area Transit Authority*, 829 F.2d 186, 188 (D.C. Cir. 1987).

If a state waives its Eleventh Amendment immunity, the suit is no longer barred. *See Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89 (1984).

The waiver of immunity, however, must be explicit and a federal suit cannot be based on a state's general consent to be sued in its own state courts. Waiver will be found only where it is stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable interpretation. *Edelman* v. *Jordan*, *supra*, 415 U.S. at 651 (quoting *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151 (1909)). *See also Barrett* v. *United States*, No. 87-6189, slip op. at 5179 (2d Cir. August 2, 1988); *Minotti* v. *Lensink*, 798 F.2d 607, 610 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 2484 (1987).

The "unmistakably clear language" required for a waiver of Eleventh Amendment immunity is not found in the charter of PATH. The consent to suit provision of the Port Authority statute essentially empowers the Authority merely to sue and be sued.[13] In *Pennhurst State School & Hosp.*

[13] The Port Authority of New York and New Jersey's statutory consent to suit provides:

> Upon the concurrence of the state of New Jersey in accordance with section twelve §7117 hereof, the states of New York and New Jersey consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise (including proceedings to enforce arbitration agreements) against the Port of New York Authority (hereinafter referred to as the "Port Authority"), and to appeals therefrom and reviews thereof, except as hereinafter provided in sections two through five, inclusive, hereof.

N.Y. Unconsol. Law §7101 (McKinney 1979).
N.J. Stat. Ann. §32:1-157 (West 1963).

v. *Halderman*, *supra*, 465 U.S. 89, the Court declared that "[a] state's constitutional interest in immunity encompasses not only *whether* it may be sued, but *where* it may be sued." *Id.* at 99. The above waiver does not meet the "unmistakably clear language" requirement because "the Supreme Court has made it clear that the particular provision relied on must indicate the state's specific intention to be sued in federal court." *Atascadero State Hosp.*, *supra*, 473 U.S. at 241.

A number of federal courts have found that the use of a similar sue and be sued provision cannot be construed as waiving a State's Eleventh Amendment immunity from suits in federal court. In *Trotman* v. *The Palisades Interstate*

Prior to the promulgation of §7101, the Port Authority was considered entirely immune from suit. *See Port Authority Police Benevolent Association, Inc.* v. *Port Authority of New York and New Jersey*, *supra*, 819 F.2d at 418.

The Port Authority of New Jersey and New York's venue statutes provide:

> The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the Port Authority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district. The Port Authority shall be deemed to be resident of each such county or judicial district for the purpose of such suits, actions or proceedings. Although the Port Authority is engaged in the performance of governmental functions, the said two states consent to liability on the part of the Port Authority in such suits, actions or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation.

N.Y. Unconsol. Law §7106 (McKinney 1979).
N.J. Stat. Ann. §32:1-162 (West 1963).

Park Commission, *supra*, 557 F.2d at 39, the Second Circuit interpreted the meaning of a sue and be sued clause in an interstate compact. Concluding that the interpretation of the clause would turn on federal law, the Court held that "we fail to perceive any reason why a bi-state commission cannot, when sued in federal court, enjoy the Eleventh Amendment immunity of its signatory states." *Id.* at 38. The court ruled that sue and be sued language in the Palisades Interestate Park Commission enabling statute could not be interpreted as giving individuals consent to sue the Commission in federal court. *See also Rockwell* v. *New Jersey Transit Rail Operations*, *supra*, 682 F. Supp. at 284 (New Jersey Transit statute conferring a capacity to be sued does not constitute a clear and unmistakable waiver of sovereign immunity).

Similarly, in *Port Authority Police Benevolent Association, Inc.* v. *Port Authority of New York and New Jersey*, *supra*, 819 F.2d at 418, the Third Circuit rejected the contention that language in the Port Authority statute constituting the capacity to sue and be sued abrogated the Port Authority's Eleventh Amendment immunity. *Id.* (citing *Florida Dept. of Health and Rehabilitative Serv.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981)).

District courts both in New York and New Jersey have relied on *Port Authority Police Benevolent Association, Inc.*, *supra*, to dismiss actions against the Port Authority and against PATH based on their Eleventh Amendment immunity from suit in federal court. *See e.g.*, *O'Donnell* v. *Port Authority of New York and New Jersey*, No. 84 Civ. 8188, slip op. at 6 (S.D.N.Y. September 3, 1987) (under the Eleventh Amendment the Port Authority is not amenable to suit); *Borough of Fort Lee* v. *The Port Authority of New York and New Jersey*, No. 87 Civ. 1238, slip. op at (D.N.J.

March 14, 1988) (consent statutes of Port Authority do not constitute an unequivocal waiver of immunity).[14]

This Court believes that PATH should be afforded Eleventh Amendment immunity. PATH is an alter-ego of the States of New York and New Jersey and, in the absence of an unequivocal waiver specifically applicable to federal court jurisdiction, the court declines to find that PATH has waived its constitutional immunity.[15]

CONCLUSION

The Court finds that PATH, a wholly-owned subsidiary of the Port Authority of New York and New Jersey, is a state entity. The FELA does not abrogate PATH's sovereign

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[14] The only case which can be interpreted as reaching a contrary conclusion is *Raysor* v. *Port Authority of New York and New Jersey*, 768 F.2d 34 (2d Cir. 1985), *cert. denied*, 475 U.S. 1027 (1986). In *Raysor*, the Second Circuit permitted §1983 actions for false arrest and malicious prosecution to proceed on a theory of *respondeat superior* against the Port Authority since the Court found that New York and New Jersey had waived the Port Authority's immunity from such suits. *Id.* at 38. The Court believes that *Raysor* is not pertinent to this case because the question of Eleventh Amendment immunity and the need for an explicit waiver to bring suit in federal court appears not to have been directly addressed in *Raysor*. *See O'Donnell* v. *Port Authority of New York and New Jersey*, No. 84 Civ. 8188, slip op. at 6 (S.D.N.Y. September 3, 1987). Moreover, all recent cases have held that the Port Authority is not amenable to suit in federal court.

[15] Finally, plaintiff's argument that the dismissal of the action will deny plaintiff the equal protection of the laws and ignore the supremacy of the Federal Railroad Statutes is without merit. In *Ex parte State of New York*, 256 U.S. 490 (1921), and its progeny, it was clearly established that allowing Eleventh Amendment immunity for state owned businesses does not violate the equal protection of the individuals seeking to sue the state. *See Rockwell* v. *New Jersey Transit Rail Operations*, 682 F. Supp. 280, 284 (D.N.J. 1988).

immunity and PATH has not unequivocally consented to suit in federal court through its waiver statute. Therefore, PATH enjoys Eleventh Amendment immunity which deprives this court of subject matter jurisdiction to entertain the instant claim. Accordingly, defendant PATH's motion for judgment on the pleadings is granted and the action is dismissed.

It is so ordered.

Dated: New York, New York
August 11, 1988

/s/ Robert J. Ward
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES T. FOSTER

Plaintiff,

— against —

87 CIVIL 4593 MGC
JUDGMENT

PORT AUTHORITY TRANS-HUDSON CORP.

Defendant.

[Filed October 18, 1988]

Defendant( ) having moved for an order pursuant to Fed. R. Civil P. 12(c), and the said motion( ) having come before the Honorable Miriam Goldman Cedarbaum, U.S.D.J., and the Court thereafter on October 17, 1988, having handed down its memorandum opinion and order (#63274), granting defendant's motion for judgment on the pleadings, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

DATED: NEW YORK, N.Y.
October 16, 1988

/s/ Raymond F. Burghardt
Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 10/19/88.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES T. FOSTER,

Plaintiff,

– against –

87 Civ. 4593
(MGC)

PORT AUTHORITY
TRANS-HUDSON CORPORATION,

Defendant.

MEMORANDUM OPINION AND ORDER

APPEARANCES:

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CEDARBAUM, J.

This is a suit brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, against the Port Authority Trans-Hudson Corporation ("PATH"). PATH is a subsidiary of the Port Authority of New York and New Jersey. PATH has moved pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings for lack of subject matter jurisdiction, on the ground that the Eleventh Amendment confers upon it immunity from suit in federal court. For the reasons discussed below, the motion is granted.

In *Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey*, 319 F.2d 413 (3d Cir.), *cert. denied*, 108 S. Ct. 344 (1987), the Third Circuit held that under the Supreme Court's analysis in *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (*1979*), the Port Authority should be created as a state agency for purposes of the Eleventh Amendment. Defendant argues that the same principle applies to the Port Authority's subsidiary, PATH. *See* N.Y. Unconsol. Law § 6612 (McKinney 1979) ("Such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions and activities"). Plaintiff has expressed no disagreement with that position. Plaintiff's sole argument on this motion is that New York and New Jersey have waived PATH's Eleventh Amendment immunity.

In 1987, the Supreme Court in *Welch v. State Department of Highways and Public Transportation*, 107 S. Ct. 2941 (1987), explicitly overruled *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), which had held that an employee of a state-owned

railroad could sue the state in federal court under the FELA even though neither Congress nor the state had clearly expressed an intention to abrogate Eleventh Amendment immunity. Since the *Welch* decision, there have been several federal decisions dismissing FELA suits against PATH. *E.g.*, *Feeney v. Port Authority Trans-Hudson Corp.*, No. 87 Civ. 9256 (S.D.N.Y. Aug. 11, 1988); *McIntosh v. Port Authority of New York and New Jersey and Taglietta*, No. 86 Civ. 2536 (D.N.J. Apr. 6, 1988). None of those cases, however, has considered the statutory provision cited by plaintiff in this case.

Plaintiff relies primarily on N.Y. Unconsolidated Law § 7106. Even when read together with N.Y. Unconsolidated Law § 7101, the portion of section 7106 providing that the Port Authority may be held liable in "suits, actions or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation" is insufficient to establish Eleventh Amendment waiver, since it does not specify an intention to permit suits in federal courts. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985); *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147, 150 (1981) (per curiam); *Della Grotta v. Rhode Island*, 781 F.2d 343, 345-46 (1st Cir. 1986).

Section 7106 also contains the following venue provision:

> The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county *or a judicial district*, establish by one of said states *or by the United States*, and situated wholly or partially within the port of New York district.

(emphasis added). In order for a state to waive Eleventh Amendment immunity, a statute must speak "in the 'most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Minotti v. Lensink*, 798 F.2d 607, 610 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 2484 (1987), quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *see also Atascadero*, 473 U.S. at 238 n.1 (statute must provide "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment"). Defendant argues that this stringent test for waiver has not been met in this case. Without pointing to any examples, defendant contends that the portion of section 7106 providing for venue in a federal judicial district may be read as applying only to suits brought under statutes as to which Eleventh Amendment immunity has been abrogated – because of a congressional exercise of the powers of section 5 of the Fourteenth Amendment, *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Title VII), or because of an explicit waiver by the states of New York and New Jersey.

Although the reason for the reference in section 7106 to a federal judicial district is far from clear, it is clear that the legislature of New York knows how to consent to suit in federal court if that is its purpose. It is difficult to believe that it would have chosen the indirect and ambiguous language of section 7106 if its intention had been to waive the Port Authority's Eleventh Amendment immunity. Furthermore, an examination of the legislative history of this statute shows an intention only to waive sovereign immunity. The Eleventh Amendment was not addressed. *See* 1950 New York State Legislative Annual 203-04.

For these reasons, defendant's motion for judgment on the pleadings is granted.

SO ORDERED.

Dated: New York, New York
October 14, 1988

MIRIAM GOLDMAN CEDARBAUM
United States District Judge

COMPACT ARTICLE III

N.Y. Unconsol. L. §6404; N.J.S.A. 32:1-4

Port Authority of New York and New Jersey created

There is hereby created "The Port of New York Authority" (for brevity hereinafter referred to as the "Port Authority"), which shall be a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other, or by act or acts of congress, as hereinafter provided. On and after July first, nineteen hundred seventy-two, the port authority shall be known and designated as "The Port Authority of New York and New Jersey."

COMPACT ARTICLE IV

N.Y. Unconsol. L. §6405; N.J.S.A. 32:1-5

Commissioners; appointment; term; removal

The port authority shall consist of twelve commissioners, six resident voters from the state of New York, at least four of whom shall be resident voters of the city of New York, and six resident voters from the state of New Jersey, at least four of whom shall be resident voters within the New Jersey portion of the district, the New York members to be chosen by the state of New York and the New Jersey members by the state of New Jersey in the manner and for the terms fixed and determined from time to time by the legislature of each state respectively, except as herein provided. Each

commissioner may be removed or suspended from office as provided by the law of the state from which he shall be appointed.

COMPACT ARTICLE VI

N.Y. Unconsol. L. §6407; N.J.S.A. 32: 1-7

Powers of port authority; comprehensive plan for development of port

The port authority shall constitute a body, both corporate and politic, with full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within said district; and to make charges for the use thereof:[1] and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it . . . .

COMPACT ARTICLE VII

N.Y. Unconsol. L. §6408; N.J.S.A. 32:1-8

Additional powers; reports; pledging of credit

The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other. Unless and until otherwise provided, it shall make an annual report to the legislature of both states, setting forth in detail the operations and transactions conducted by it pursuant

to this agreement and any legislation thereunder. The port authority shall not pledge the credit of either state except by and with the authority of the legislature thereof.

COMPACT ARTICLE XV

N.Y. Unconsol. L. §6416; N.J.S.A. 32:1-16

Appropriations for expenses

Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two states, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year.

COMPACT ARTICLE XVII

N.Y. Unconsol. L. §6418; N.J.S.A. 32:1-18

Incurring obligations for expenses

Unless and until otherwise determined by the action of the legislatures of the two states, the port authority shall not incur any obligations for salaries, office or other administrative expenses, within the provisions of article fifteen,[1] prior to the making of appropriations adequate to meet the same.

N.Y. Unconsol. L. §6459; N.J.S.A. 32:1-33

Powers of port authority and municipalities in executing plan; securities tax exempt; limitations

* * *

"The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, but it shall have no power to pledge the credit or either state or to impose any obligation upon either state, or upon any municipality, except as and when such power is expressly granted by statute, or the consent by any such municipality is given."

N.Y. Unconsol. L. §7101; N.J.S.A. 32: 1-157

Consent to suits against the Port Authority

Upon the concurrence of the state of New Jersey in accordance with section twelve[1] hereof, the states of New York and New Jersey consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise (including proceedings to enforce arbitration agreements) against the Port of New York Authority[2] (hereinafter referred to as the "Port Authority"), and to appeals therefrom and reviews thereof, except as hereinafter provided in sections two through five,[3] inclusive, hereof.

N.Y. Unconsol. L. §7106; N.J.S.A. 32: 1-162

Venue of action; consent to liability for tortious acts

The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New

York district. The port authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings. Although the port authority is engaged in the performance of governmental functions, the said two states consent to liability on the part of the port authority in such suits, actions or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation.

N.Y. Unconsol. L. §7151; N.J.S.A. 32: 2-6 et seq.

Action of commissioners to be approved or vetoed by Governor

Except as provided by this act,[1] no action taken at any meeting of the port of New York authority[2] by any commissioner appointed from the state of New York shall have force or effect until the governor of the state of New York shall have an opportunity to approve or veto the same under the provisions of article sixteen of the port compact or treaty entered into between the states of New York and New Jersey, dated April thirtieth, nineteen hundred and twenty-one.[2]

Supreme Court, U.S.
FILED
OCT 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PORT AUTHORITY
TRANS-HUDSON CORPORATION,
Petitioner,

– against –

PATRICK FEENEY,
Respondent.

PORT AUTHORITY
TRANS-HUDSON CORPORATION,
Petitioner,

– against –

CHARLES T. FOSTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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On the Petition:
RICHARD W. MILLER

QUESTIONS PRESENTED

1. Is the Petitioner, Port Authority Trans- Hudson Corporation, immune from suit in the federal courts by virtue of the protections afforded by the Eleventh Amendment?

2. Has the immunity afforded by the Eleventh Amendment been waived by or on behalf of the Petitioner, Port Authority Trans- Hudson Corporation?

3. Is the Petition for a Writ of Certiorari untimely and therefore, should it be denied?

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Respondent.

ON THE PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Patrick Feeney and Charles T. Foster, respectfully oppose the petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in the above-captioned consolidated cases.

STATEMENT

Respondents respectfully disagree with the characterizations contained in petitioner's brief, at page 4 thereof, of the opinion of the Second Circuit. The court examined the form and structure of PATH in great detail, citing numerous sections of the legislation creating and governing it. The court then considered the holding of Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), and further determined that PATH was not entitled to Eleventh Amendment immunity. The court did not

base its decision solely upon the determination that a verdict of liability would not place the state treasury at risk. The court also based its decision on a finding that the Port Authority has waived its immunity under the Eleventh Amendment. The court based its determination not only on the venue statute (N.Y. Unconsol. L. Section 7106 (McKinney 1979) and N.J. Stat. Ann. Section 32:1-162 (West 1963) but also upon a discussion of the legislation whereby PATH consented to being sued. Petitioner's statement of the case is thus both unfair and inaccurate.

REASONS FOR DENIAL OF THE WRIT

POINT I

There Is Insufficient Conflict Between The Second Circuit And The Third Circuit And The Petition Should Be Denied.

The granting of a writ of certiorari is entirely within the judicial discretion of this Court, and "will be granted only when there are special and important reasons therefore" S.Ct.R 17. While, at first blush, petitioner's brief paints a picture of dire and extreme conflict between the Second Circuit and Third Circuit, a careful review of the principle cases cited therein reveals that the conflict appears to be resolving itself, at least as far as the point of view of the Third Circuit is concerned. Great weight is placed upon the decision of the Third Circuit in Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey (PBA) 819 F.2d 413(3d Cir. 1987), cert. denied, ___U.S.___;108 S.Ct. 344 (1987). Since that case was decided, the Third Circuit appears to be moving away in some

degree from its holding that PATH is entitled to Eleventh Amendment immunity. Most recently, in Fitchik v.New Jersey Transit Rail Operations, Inc., 873 F.2d 655 (3d Cir. 1989), the court (in its decision that was handed down scant days prior to the Second Circuit's decision in Feeney and Foster) referred to its prior decision in Port Authority Police Benevolent Association, Inc. (supra) only in passing and, interestingly, in its consideration of New Jersey Transit's funding, placed great weight upon its determination that New Jersey Transit was not the alter ego of the state, by looking at whether the state must reimburse the agency. This is precisely one of the bases for the Second Circuit's decision denying Eleventh Amendment immunity to the petitioner.

Thereafter, in Leadbeater v. Port Authority Trans-Hudson Corporation, 873 F.2d 45 (3d Cir.1989), a case that was filed two days prior to the decision of the Second Circuit, the Third Circuit again moved away from its decision in Port Authority Police Benevolent Association, Inc. (supra). The court examined only two sections of the enabling legislation, N.Y. Unconsol. L. Section 7101 and Section 7106 (McKinney 1979) and reached its determination (not without some unease) that the venue provision of the aforementioned Section 7106 did not constitute a waiver of Eleventh Amendment immunity. The court did not consider the other sections of the legislation governing the establishment and conduct of PATH, as the Second Circuit did, and further the Third Circuit apparently based its determination upon the two district court

opinions in Feeney and Foster. Keeping in mind that both Fitchik (supra) and Leadbeater (supra) were both decided prior to the Second Circuit's decision in this case, it is apparent that the language and reasoning of the Third Circuit in both cases appears to be moving away from its determination in Port Authority Police Benevolent Association, Inc. (supra) and possibly towards the ultimate resolution of any disagreement or conflict so heavily emphasized in petitioner's brief.

Petitioner's reliance in its brief upon prior decisions of this Court, to support its arguement that a substantial conflict exists between the Second Circuit and the Third Circuit, is misplaced. In Welch v. Texas Department of Highways and Public Transportation, 483 U.S.468 (1987),

this Court did not state that there can be no waiver of Eleventh Amendment immunity, even assuming that, for arguement sake, PATH is considered an agency of the state. In Welch, this Court stated quite clearly that a state, and by inference an agency thereof, can waive its immunity and consent to suit in federal court. If that is the case, such a suit would not be barred by the Eleventh Amendment. The question thus becomes whether or not the waiver in the various statutes is stated in express terms so that the conclusion can only be that there has been a waiver of Eleventh Amendment immunity. It should be further noted that the question of express waiver by a state was not before this court in the Welch case.

Petitioner also refers to this Court's

holding in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) in support of its arguement. However, this Court considered not only the impact of the judgment of liability on the state treasury, but also considered the fact that the Tahoe Regional Planning Agency was a political sub-division. The Second Circuit, in its decision below, likewise considered the structure and the powers and duties and statutes governing the Port Authority and cited this Court's holding in Lake Country Estates, Inc. (supra), including this Court's restriction of Eleventh Amendment protection to "one of the United States" (at 400) as a basis for its denial of Eleventh Amendment protection to the petitioner.

It is thus suggested that the apparent conflict, between the Second Circuit and

Third Circuit, so heavily relied upon in petitioner's brief, is more one of form than substance, and in two decisions handed down just prior to the decision of the Second Circuit herein, Fitchick and Leadbeater, the Third Circuit appears to be moving away from its earlier position taken in Port Authority Police Benevolent Association, Inc. (supra). It is submitted that the granting of the petition is unwarranted and unnecessary.

POINT II

The Petition For A Writ Of Certiorari Filed By The Petitioner Is Untimely And Should Be Denied.

The petition for the writ of certiorari filed by the Port Authority Trans-Hudson Corporation, the petitioner herein, was not filed within the time required by Title 28, U.S.C., Section 2101(c).

The judgment of the United States Court of Appeals for the Second Circuit in favor of the respondents was entered on April 26, 1989 (See petitioners brief pages A-22-23). Petitioners brief contains an admission, at page two thereof, of the entry of judgment on April 26, 1989. The petition for certiorari was filed on September 2, 1989, and accordingly is untimely and beyond the final date permitted by the aforesaid Title 28, U.S.C., Section 2101(c).

For the foregoing reason the petition for a writ of certiorari herein should be denied.

CONCLUSION

The Petition for a Writ of Certiorari

Should Be Denied.

Dated: Islip, New York
September 29, 1989

Respectfully submitted,

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Supreme Court, U.S.
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CHARLES T. FOSTER,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF PETITIONER PORT AUTHORITY TRANS-HUDSON CORPORATION

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QUESTIONS PRESENTED

1. Is the Petitioner, Port Authority Trans-Hudson Corporation, a wholly-owned subsidiary of the Port Authority of New York and New Jersey, an agency of the States of New York and New Jersey, created by interstate compact to which Congress consented, prevented from interposing Eleventh Amendment immunity from suit in federal court against a claim brought pursuant to the Federal Employer's Liability Act simply because such a judgment would not be paid out of general state tax revenues?

2. Does a reference to federal judicial districts in the Port Authority suability statute's general purpose venue provision waive Eleventh Amendment immunity in light of this Court's stringent standards for a finding of waiver?

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BRIEF ON BEHALF OF PETITIONER PORT AUTHORITY TRANS-HUDSON CORPORATION

OPINIONS BELOW

The opinion of the Court of Appeals in *Patrick Feeney v. Port Authority Trans-Hudson Corporation* (Pet. App., A8 - A21) is reported at 873 F.2d 628. The opinion of the District Court (Pet. App., A27 - A44) is reported at 693 F.Supp. 34.

The opinion of the Court of Appeals in *Charles T. Foster v. Port Authority Trans-Hudson Corporation* (Pet. App., A24 - A25) is reported at 873 F.2d 633. The District Court's opinion (Pet. App., A46 - A50) is unreported.

JURISDICTION

The judgments of the Court of Appeals (Pet. App., A6 - A7; A22 - A23) were entered on April 26, 1989. The cases were consolidated by order of the Court of Appeals on May 9, 1989 (Pet. App., A3 - A5). A petition for rehearing was denied on June 6, 1989 (Pet. App., A1 - A2). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

Portions of the Compact and subsequently enacted bi-State legislation, N.Y. Unconsol. L. §§6401 *et seq.* (McKinney 1979); N.J.S.A. 32:1-1 *et seq.* (West 1963), relied upon by the Court of Appeals below, are reproduced in the Pet. App. at A51 - A55. Other portions of the Compact and subsequently enacted bi-State legislation, specifically relied upon herein, are reproduced in an Appendix to this Brief (A1 - A14).

STATEMENT

The Port Authority of New York and New Jersey is a direct agency of the States of New York and New Jersey created by an interstate Compact to which Congress consented (Ch. 154, Laws of N.Y., 1921; Ch. 151, Laws of N.J., 1921; 42 U.S. Stat. 174 (1921)). The Port Authority, pursuant to the 1921 Compact and subsequently enacted bi-State legislation, operates various terminal, transportation, and other facilities of commerce in the statutorily defined Port District, including through its wholly-owned subsidiary, the Petitioner Port Authority Trans-Hudson Corporation, the PATH interstate railway system. N.Y. Unconsol. L. §§6601 *et seq.* (McKinney 1979); N.J.S.A. 32:1-35.50 *et seq.* (West 1963).

The respondents in these consolidated cases are employees of PATH, and each had sought damages pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §§51 *et seq.* (1982) (Pet. App., A10, A28, A47). In each case, PATH moved pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings upon the ground that PATH enjoys Eleventh Amendment immunity from suit on FELA claims in federal court. (*Id.*) The district court in each case granted PATH's motion (Pet. App., A44, A49).

The district court in *Feeney* held that under the reasoning of the Third Circuit in *Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir. 1987), *cert. denied*, ____ U.S. ____; 108 S.Ct. 344 (1987), the Port Authority was an arm of the States entitled to Eleventh Amendment immunity under the test laid down by this Court for determining such immunity — a finding which the district court found was fully applicable to PATH as the Port Authority's wholly-owned subsidiary (Pet. App., A43). In *Foster*, the district court reached only the issue of waiver since

PATH's status as a State agency had not been contested. (Pet. App., A47).

On the issue of waiver, both district courts carefully examined the Port Authority's and, thus, PATH's, suability statute and concluded that the statute contained neither an express, nor an implied, waiver of Eleventh Amendment immunity. Indeed, the district court in *Foster*, after examining the legislative history of the suability statute contained in the New York Legislative Annual, specifically held that the question of Eleventh Amendment immunity "was not addressed." (Pet. App., A49).

The Court of Appeals for the Second Circuit reversed both district courts, finding that PATH was not entitled to interpose Eleventh Amendment immunity, and remanded for further proceedings (Pet. App., A10, A18). The Court of Appeals held that the Port Authority and, by extension PATH, was not intended to be an agency for Eleventh Amendment purposes, although it acknowledged that the issue was, in its words, "close" (Pet. App., A16). It also held that, in any event, the State Legislatures had both implicitly and explicitly waived Eleventh Amendment immunity in the Port Authority's suability statute (Pet. App., A16).

More specifically, the Second Circuit, in ruling that PATH was not a State agency for Eleventh Amendment purposes, based its decision mainly on its determination that a monetary "judgment against PATH would not be enforceable against either New York or New Jersey" (Pet. App., A14). It deemed this factor sufficient to outweigh the other indicators of State agency status that it named, to wit: the method of appointment of Port Authority Commissioners and the gubernatorial veto power over Port Authority actions (Pet. App., A15).

With regard to waiver, the Second Circuit held that the Legislatures of the States of New York and New Jersey had effected an "explicit waiver, *albeit* partial" (emphasis supplied) (Pet. App., A18) of Eleventh Amendment immunity by including a reference to federal judicial districts in the general purpose venue provision of the Port Authority's suability statute. It reasoned that otherwise the reference to federal judicial districts would be meaningless (*Id.*). The court also held that there had been an implicit waiver of immunity. It noted that the suability statute legislatively overruled, *inter alia*, the case of *Howell v. Port of New York Authority*, 34 F.Supp. 797 (D.N.J. 1940), which had held that the Port Authority was a State agency rather than a political subdivision, a "conclusion", the Second Circuit reasoned, "that would support immunity under the Eleventh Amendment . . . ." (Pet. App., A17).

A Petition for Rehearing with suggestion for Rehearing *en banc* in the now consolidated cases was denied on June 6, 1989 (Pet. App., A1 - A2). This Court granted PATH's Petition for a Writ of Certiorari on October 30, 1989.

SUMMARY OF ARGUMENT

A. This Court in *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), delineated a test for determining whether a bi-State agency, such as the Port Authority and by extension, its wholly-owned subsidiary, petitioner, PATH, is a State agency for Eleventh Amendment purposes or a political subdivision in the nature of a county or a municipality which, for apparently historical reasons, is not entitled to claim such immunity.

Applying and weighing all the *Lake Country Estates* factors, no one of which by itself is pre-eminent or controlling,

we submit that the Port Authority is entitled to State agency status for Eleventh Amendment purposes inasmuch as the Legislatures of both States have declared many times that, in effectuating their statutory directives and authorizations, the Port Authority performs governmental functions, and both the federal and state courts have, without exception, held that it is a direct agency of the Compacting States themselves, engaged, on their behalf, in fulfilling functions of State government.

Moreover, although state tax or other general state revenues strictly speaking would remain untouched by judgments against the Port Authority, this factor does not make the agency, which presently is a *source*, rather than a recipient, of revenues for the Compacting States, any less a State agency. Indeed, the New York and New Jersey Legislatures have reserved to themselves the power to direct the flow of Port Authority monies.

B. While the Second Circuit's decision purports to analyze the Port Authority's status pursuant to the *Lake Country Estates* factors, in fact, its determination that the Port Authority is not an agency for Eleventh Amendment purposes is based solely on just one factor, namely, its determination that the treasuries of New York and New Jersey would not be liable for a judgment against the Port Authority or PATH. It found this single factor enough to outweigh other indicia of State agency status.

We submit that in thus overemphasizing the so-called "state treasury" factor, the Second Circuit misconstrued this Court's opinion in *Lake Country Estates* and misapplied the test of *Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S. 459 (1945). There, this Court's focus on the state treasury was for the purpose of

determining who was the real party in interest since State officials were named defendants.

Moreover, in unduly limiting the definition of "state treasury" to state tax or other general state revenues, the Second Circuit fundamentally misinterpreted Eleventh Amendment jurisprudence since the protection of public funds cannot be the sole purpose of Eleventh Amendment immunity.[1] If it were, municipalities, counties, and other political subdivisions should be entitled to the protection of the immunity to protect the public funds entrusted to their authority. But, as noted above, historically they are not.

Rather, the Eleventh Amendment finds not only its genesis but also its continued significance in the vindication of State sovereign prerogatives in the name of federalism. Consequently, the test developed in *Ford* to identify the proper party to a lawsuit should not be turned into a vehicle for federal court interference in State management of its own internal fiscal affairs.

C. Since the Port Authority, by virtue of the absence of a consent-to-suit provision in the 1921 Port Compact which created it and to which Congress consented, was originally formed as an entity totally immune from suit even in the courts of New York and New Jersey, the question of its Eleventh Amendment immunity in federal courts comes down to whether some thirty years later the two Legislatures waived this immunity when they adopted the Authority's suability statute.

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[1] Indeed, state treasury funds are reachable, notwithstanding the Eleventh Amendment, under certain circumstances, to wit: an award of attorney fees in an appropriate case or where the funds are to be expended in obedience to an injunction mandating that State officials conform their conduct to the requirements of federal law.

The Second Circuit, although acknowledging the stringency of this Court's standards for finding that Eleventh Amendment immunity has been waived, nevertheless ruled that the Legislatures somehow both implicitly and explicitly did just that when they enacted the Authority's suability statute. We submit that in so holding the Second Circuit simply ignored the dictates of this Court.

More specifically, the Second Circuit concluded that the Legislatures implicitly waived Eleventh Amendment immunity. It referred to the legislative history of the suability statute where, included in a long list of cases which had held that the Port Authority shared the sovereign immunity of the States, appeared a citation to the United States District Court opinion in *Howell v. Port of New York Authority*, 34 F.Supp. 797 (D.N.J. 1940). *Howell* had held that the Port Authority was a State agency and not a municipal corporation. The Second Circuit reasoned that the Legislatures must have thereby intended to waive the Eleventh Amendment immunity characteristic of State agencies. We submit that the Second Circuit's analysis flies directly in the face of the well-settled principle, articulated by this Court time and time again, that States do not waive Eleventh Amendment immunity merely by waiving sovereign immunity in their own courts. Moreover, the Second Circuit's reliance on legislative history is misplaced since this Court has counseled over and over that waiver of immunity must be found in the text of the waiving legislation itself.

Finally, the Second Circuit's finding of an explicit waiver in the reference to federal judicial districts in the general purpose venue provision of the suability statute, which it conceded was "somewhat anomalous" in the Eleventh Amendment context, simply does not take heed of this Court's caveat that such waivers must be "unmistakable" and "clearly expressed".

POINT I

The Port Authority Of New York And New Jersey, As A Direct Agency Of Those States, Is Immune From Suit Under The Eleventh Amendment.[2]

In *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), this Court specifically

> ". . . granted certiorari to decide whether the Tahoe Regional Planning Agency, an entity created by Compact between California and Nevada, is entitled to the immunity that the Eleventh Amendment provides to the compacting States themselves." 440 U.S. at 393 (footnote omitted).

This Court's task was to determine whether in creating the Tahoe Regional Planning Agency (TRPA), California and Nevada had created a State agency or a political subdivision. Thus,

> "If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity." *Id.* at 401.

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[2] This same immunity applies no less to Petitioner, PATH, the Port Authority's wholly-owned subsidiary. The Legislatures of the two States have expressly stated that:

> "Such subsidiary corporation . . . shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions and activities". N.Y. Unconsol. L. §6812 (McKinney 1979); N.J.S.A. 32:1-35.61 (West 1963) (A5).

The legislation also provides that:

> "The directors of such subsidiary corporation shall be the same persons holding the offices of commissioners of the port authority." *Id.*

In evaluating the agency, this Court looked to several factors. It analyzed the language of the Compact to determine how the Compacting States themselves denominated and considered the agency. So too, it looked to the Compact's provisions with respect to how and by whom the agency's governing board was appointed, how the agency was funded, as well as the responsibility or lack thereof of the Compacting States' treasuries for the obligations of the agency. This Court took particular note of the fact that the function performed by the agency, land use planning, was "traditionally a function performed by local governments." *Id.* at 402.

This Court also searched for indicia of State control over the actions of the agency. Of great moment was the fact that there was no "veto at the State level" over the agency's authority to make rules within its own jurisdiction — a characteristic this Court found to be common to cities, towns, and counties as opposed to State agencies (*Id.*). Indeed, this Court was particularly impressed by the fact that the TRPA was so independent of State control that one of the Compacting States, California, had "resorted to litigation in an unsuccessful attempt to impose its will" on the agency. 440 U.S. at 402.

Therefore, with respect to TRPA this Court had no choice but to conclude that:

> ". . . nothing short of an absolute rule [that any agency created by interstate compact has Eleventh Amendment immunity] would allow TRPA to claim the sovereign immunity provided by the Constitution to Nevada and California." *Id.*

Significantly, however, this Court did not find that any one of these factors was pre-eminent, or, in and of itself, controlling upon the question of Eleventh Amendment immunity. *See*, Point II, *infra*.

In applying the *Lake Country Estates* factors to the Port Authority, no such "absolute rule" is required for a finding of immunity. We shall now show that the Port Authority is entitled to invoke Eleventh Amendment immunity as an arm of the States of New York and New Jersey. *See*, *Port Authority Police Benevolent Association, Inc. (PBA) v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir. 1987), *cert. denied*, ____ U.S. ____; 108 S.Ct. 344 (1987).

A. The Port Authority was created to be a State agency, not a political subdivision in the nature of a county or a municipality.

The Port Authority of New York and New Jersey was created by a Congressionally-consented-to interstate Compact between the two States, 42 U.S. Stat. 174 (1921), consenting to Ch. 154, Laws of New York, 1921; Ch. 151, Laws of New Jersey, 1921. In creating the Port Authority, both States expressly provided that the Port Authority should have those responsibilities and duties which were concurred in by the Legislatures of both States. N.Y. Unconsol. L. §6408 (McKinney 1979); N.J.S.A. 32:1-8 (West 1963) (Pet. App., A52).

Significantly, whenever the issue has arisen, the courts of New York and New Jersey uniformly have held that the Port Authority is a direct agency of the two States performing governmental functions on behalf of State government.

The New Jersey Supreme Court has described the Port Authority as having been created by the two States as their joint agent, to wit:

> "In 1921 the Legislatures of New Jersey and New York authorized the execution of the port compact . . . establishing the Port of New York district and creating the Port of New York Authority as their joint agency." *Newark v. Essex County Board of Taxation*, 54 N.J. 171, 175; 254 A.2d 513, 515 (1969), *cert. denied*, 396 U.S. 987 (1969).

Along the same lines, in *Trippe v. Port of New York Authority*, 14 N.Y.2d 119, 122-23; 198 N.E.2d 585, 586 (1964), the New York Court of Appeals described the Port Authority as

> "a governmental agency of the States of New York and New Jersey"

and as

> "a direct agency"

of the two States.

A number of decisions recognizing the nature of the Port Authority as a State agency were collected in *Port of New York Authority v. J.E. Linde Paper Company*, 205 Misc. 110, 113-114; 127 N.Y.S.2d 155, 158-159 (N.Y. Mun. Ct. 1953), wherein the court in unequivocal terms declared that:

> "The Port Authority is an arm and agency of the States of New York and New Jersey, and in all of its activities, is engaged in the performance of essential governmental functions. (*Bush Term. Co. v. City of New York*, 152 Misc. 144, *aff'd*, 282 N.Y. 306; *Commissioner of Internal Revenue v. Shamberg*, 144 F.2d 998, *certiorari denied* 323 U.S. 792; *Graves v. New York ex rel. O'Keefe*,

> 306 U.S. 466, 484; *Helvering v. Gerhardt*, *supra*; *Gaynor v. Marohn*, 268 N.Y. 417, 424,425; *People ex rel Buffalo & Port Erie Public Bridge Authority v. Davis*, 277 N.Y. 292, 299; *Port of New York Authority v. Township of Weehawken*, 27 N.J. Super. 328; *Sullivan v. Port of New York Authority*, 134 N.J.L. 124; *Miller v. Port of New York Authority*, 18 N.J. Misc. 601, 606)."

The court went on to say:

> "The Port Authority has uniformly been held to be in the position of 'the State' whenever the issue has arisen." *Id.*

In *Voorhis v. Cornell Contracting Corp. & Port of New York Authority*, 170 Misc. 908, 912; 10 N.Y.S.2d 378, 381 (City Ct. N.Y. Co. 1938), the court referred to the Port Authority as the "immediate agent of two sovereigns," and said:

> "Indeed, it is hard to see how there could be a clearer instance of an agency sharing the immunity of its creators."

Similarly, the old New Jersey Supreme Court, in *Miller v. Port of New York Authority*, 18 N.J. Misc. 601, 606; 15 A.2d 262, 266 (Sup. Ct. 1939) said:

> "Since the Authority is undoubtedly a direct state agency, exercising an essential governmental function, and, is therefore, an *alter ego* of the state, it follows that the present action is, in effect, a suit against the state itself which would, as we have seen, be clothed with sovereign immunity, unless a waiver or consent can be found in our State Constitution or in some special enactment."

And the court found no such waiver.

More recently, in *Port Authority of New York and New Jersey v. Bosco*, 193 N.J. Super. 696; 254 A.2d 676 (App. Div. 1984) (*per curiam*), cited by the Third Circuit in *PBA*, 819 F.2d at 418, the Appellate Division of the New Jersey Superior Court held that the Port Authority, as a State agency, shared New Jersey's sovereign exemption from the bar of the running of the statute of limitations. The Court explicitly held:

> "Until 1951 the Port Authority 'as an arm and agency of the states,' enjoyed sovereign immunity from suit. See cases collected at *Port of N.Y. Authority v. Weehawken Tp.*, 27 N.J. Super. 328, 333 (Ch. Div. 1953), *rev'd other grounds*, 14 N.J. 570 (1954). *We see no merit to defendants' contention that because the Legislature abrogated this particular attribute of sovereignty by N.J.S.A. 32:1-157 the status of the Port Authority as a state agency was thereby withdrawn in all other respects.*" 193 N.J. Super. at 700; 254 A.2d at 678 (emphasis supplied).

Nevertheless, in the instant case, the Second Circuit cites, as militating against the Port Authority's State agency status, a single provision in the 1922 bi-State legislation describing the Authority as a "municipal corporate instrumentality of the two states." N.Y. Unconsol. L. §6459 (McKinney 1979); N.J.S.A. 32:1-33 (West 1963) (Pet. App., A54). *Feeney v. Port Authority Trans-Hudson Corporation*, 873 F.2d 628, 631. However, as the above discussion makes plain, "municipal corporate instrumentality" is but one of many terms that have been used to describe the Port Authority. *See, PBA*, 819 F.2d at 414-15.

Indeed, more than a half century ago this Court described the Port Authority as "a state instrumentality created by New York and New Jersey" and termed its work a "function which New York and New Jersey had undertaken to perform." *Graves v. New York, ex rel. O'Keefe*, 306 U.S. 466, 484 (1939).

With all due respect to the reasoning of the Second Circuit, the fact is that no court, when squarely confronted with the question of the status of the Port Authority as a municipal corporation in contrast to that of a State agency, has so characterized the agency. *See, Whalen v. Wagner*, 4 N.Y.2d 575, 584; 152 N.E.2d 54, 57-58 (1958), where the question was whether legislation dealing with the Port Authority required a Home Rule Message:

> "There is no question, we think, that the legislation dealing with the Port Authority did not require a city message. The Port Authority is and of necessity has to be a State agency in view of its dual State character and functions."

Nearly fifty years ago in *Howell, supra*, a federal district court quite convincingly explained:

> "The ordinary significance of the term municipal corporation is a city, town or village which is an incorporation of its inhabitants, governed by elected bodies having local self-government, with power to tax and without the obligation to report its activities directly to the executive branch of government.

The Authority is not an incorporation of its inhabitants, but a Board of Commissioners appointed by officials elected by the states at large. The persons who inhabit The Port District have no direct right of vote with respect to the activities of The Authority."

• • •

"The *legislatures*, in drafting §8 of the Comprehensive Plan did *not use the common and familiar term municipal corporation but the uncommon municipal corporate instrumentality, yet in the same context or framework, they used the word municipality to designate cities, towns and villages, and it seems unlikely, they would ignore the common and known term municipal corporation and select an uncommon term if they wished to establish a municipal corporation, as the Bank contends*. Further therein, pledging the credit of either state is prohibited. This would be totally unnecessary if the complainant's interpretation of municipal corporate instrumentality is accepted,. . . ." 34 F.Supp. 797, 800 (emphasis added).

Thus, in *PBA*, the Third Circuit was able to rely upon the fact that the "long-standing judicial characterization of the Authority [as a state agency] has never been questioned by either state legislature despite the numerous opportunities to overrule these decisions . . .." 819 F.2d at 415 (matter in brackets added).

B. The Port Authority is administered as a State agency.

Again, in sharp contrast to the facts before this Court regarding TRPA in *Lake Country Estates*, *supra*, where this Court was impressed by California's difficulty in controlling the actions of the agency, in the instant case, the Port Authority is clearly administered as a State agency. *See*, *inter alia*, *Mineo v. Port Authority of New York and New Jersey*, 779 F.2d 939, 949 (3d Cir. 1985), *reh'g and reh'g en banc denied*, 783 F.2d 42 (3d Cir. 1986), *cert. denied*, 478 U.S. 1005 (1986). (Held: The Port Authority is the "State" for Tenth Amendment purposes.)

More specifically, while TRPA's governors for the most part were county appointees, the Port Authority's twelve Commissioners are appointed by the State Governors – six by the Governor of New York and six by the Governor of New Jersey – and each must be confirmed by their respective State Senates. The Commissioners are chosen in the manner prescribed, and for terms fixed and determined from time to time, by the Legislature of each State. *See*, N.Y. Unconsol. L. §6405 (McKinney 1979); N.J.S.A. 32:1-5 (West 1963) (Pet. App., A51 - A52).[3] New York Commissioners may be removed upon charges and after a hearing by the Governor of the State (Section 4, Chapter 422, Laws of New York, 1930) and New Jersey Commissioners may be removed upon charges and after a hearing

[3] The first New Jersey Commissioners of the Authority were appointed to their office by the New Jersey Legislature itself (Ch. 152, Laws of N.J., 1921), while the New York Commissioners were named by the Governor of New York, with the advice and consent of the State Senate (Ch. 203, Laws of N.Y., 1921). In 1930, when the States transferred their Holland Tunnel to the Port Authority to operate as their agent, the New York Legislature designated by name three of the six New York Commissioners. (Ch. 422, Laws of N.Y., 1930).

by the State Senate. (Section 4, Chapter 245, Laws of New Jersey, 1930), codified as N.J.S.A. 32:2-5 (West 1963) (A14). Port Authority Commissioners take the oath of office constitutionally mandated for State officers by their respective States.

Furthermore, as recognized by this Court in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1,4 (1977), the Port Authority possesses no powers that have not been delegated to it by the Legislatures of the Compacting States. N.Y. Unconsol. Laws §6408 (McKinney 1979); N.J.S.A. 32:1-8 (West 1963) (Pet. App., A52). Indeed, in this regard, we note that in *Port of New York Authority v. Weehawken Township*, 14 N.J. 570; 103 A.2d 603 (1954), the New Jersey Supreme Court held that the Port Authority could not construct a third tube to the Lincoln Tunnel for the reason that the required express legislative authorization by the States was lacking. Thus, the New Jersey Supreme Court, per then New Jersey Supreme Court Justice Brennan, specifically held:

> ". . . it is our duty to declare the law to be as the Legislature has written it. It follows that *the Port Authority has no authority to proceed with the construction of the third tunnel until expressly authorized to do so by the two States.*" 14 N.J. at 580; 103 A.2d at 608 (emphasis added).

Moreover, the Port Authority Compact provides for a gubernatorial veto power pursuant to which the Governor of either State retains the right to veto the actions of the Commissioners appointed from that State. N.Y. Unconsol. L. §6417 (McKinney 1979); N.J.S.A. 32:1-17 (West 1963) (A2).[4] The Governor of New Jersey possesses his veto

[4] The same gubernatorial veto power applies equally to the actions of PATH. N.Y. Unconsol. L. §6612 (McKinney 1979); N.J.S.A. 32:1-35.61 (West 1963) (A5).

power pursuant to N.J.S.A. 32:2-6 (West 1963); the Governor of New York, pursuant to N.Y. Unconsol. L. §§7151 *et seq.* (McKinney 1979) (Pet. App., A55).[5]

Some additional examples of State control over Port Authority administration are the Port Authority's obligation to submit an annual report to the Legislatures, N.Y. Unconsol. L. §6408 (McKinney 1979); N.J.S.A. 32:1-8

[5] The power to veto Commissioner actions naturally has led to close cooperation between both Governors and the Authority. In fact, the District of Columbia Circuit, in reversing the contempt of Congress conviction of a Port Authority official, specifically noted that:

> "After being denied the opportunity to appear before the Subcommittee, the Governors wrote identical letters to their respective representatives on the Board of Commissioners of the Authority, instructing them to direct appellant not to comply with the subpoena. The Board of Commissioners so directed appellant on June 27, 1960." *Tobin v. United States*, 306 F.2d 270, 271-72 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962).

As summarized by the Court of Appeals, a major issue raised by the Port Authority in this litigation was:

> "2. That 'the subpoena issued by the Subcommittee, demanding documents relating to the internal administration of the Port Authority which the Governors of New York and New Jersey ordered appellant not to produce, [was] an unconstitutional invasion of powers reserved to the States under the Tenth Amendment to the Constitution.' " *Id.* at 272.

It is significant that in making this argument the Port Authority and its official were supported by the Attorneys General of both New York and New Jersey. It is, indeed, difficult to imagine a more vivid example than this controversy between the Port Authority and the States, on one side, and a Subcommittee of Congress, on the other, of the fact that the Port Authority is considered by the two States to be their direct instrumentality performing important governmental functions on their behalf.

(West 1963) (Pet. App., A52); the State Comptroller's authority to examine the Port Authority's books and accounts, N.Y. Unconsol. L. §7071 (McKinney 1979); N.J.S.A. 32:2-31 (West 1963) (A9); and the requirement of concurrence by the Legislatures before Port Authority rules and regulations become effective, N.Y. Unconsol. L. §6419 (McKinney 1979); N.J.S.A. 32:1-19 (West 1963) (A3).

In sum, the Port Authority's Compact and subsequently enacted bi-State authorizing legislation make it quite clear that the Port Authority indeed is "in fact an arm of the State subject to its control . . ." within the meaning of this Court's opinion in *Lake Country Estates*, 440 U.S. at 402.

C. The Port Authority performs State, not local, functions.

TRPA, this Court noted in *Lake Country Estates*, *supra*, was engaged in "land use planning", which it characterized as "traditionally a function performed by local governments." 440 U.S. at 402. The instant case is thus easily distinguishable since the Port Authority, as noted above, is and has always been held to be an agency of the States created to carry out State functions, such as vehicular crossings and a unified air terminal network, which the Compacting States individually cannot efficiently perform because of the complication of competing sovereignties.

That the Port Authority performs State, and not local, governmental functions was the precise holding of the New York Court of Appeals in *Whalen v. Wagner*, *supra*. There the court, in ruling that no home rule message was necessary under the New York Constitution in connection with Port Authority legislation, expressly stated that prior cases

> ". . . establish the Port Authority to be engaged in matters of State concern." 4 N.Y. 2d at 582; 152 N.E. 2d at 57.

And so the State's highest court held.

That *Whalen v. Wagner*'s holding is correct is seen in the Preamble to the Compact of April 30, 1921 where the State Legislatures declared, in relevant part, as follows:

> "Whereas, . . . the commerce of the port of New York has greatly developed and increased and *the territory in and around the port has become commercially one center or district*; and
>
> Whereas, It is confidently believed *that a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey;*[a] and

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[a] The Second Circuit cited against the Port Authority's State agency status, its observation that Port Authority activities are "localized and focus only on the port of New York." *Feeney* 873 F.2d at 631. The Second Circuit's observation is contrary to the express holding of New York's highest court in *Whalen v. Wagner*, discussed above in the text. In addition we point out that access to Port Authority facilities is not limited to residents of the port district. Moreover, as will be more fully developed in subpoint D, *infra*, ten years after this legislative declaration in the Preamble, in enacting the general reserve fund legislation, specifically, N.Y. Unconsol. L. §7002 (McKinney 1979); N.J.S.A. 32:1-142 (West 1963) (A8), the Legislatures provided that any surplus Port Authority revenues be distributed as directed by the States. There is no restriction in that legislation on the distribution of such excess revenues only within the Port of New York District. Thus, irrespective of any "localized" nature of Port Authority activities, the Authority is a State agency.

In this connection, indicative of the States' intention that the Port Authority be considered a State rather than a local instrumentality is the fact that the States adopted their 1921 Compact which created this agency in the form of an amendment to their 1834 agreement in which they settled a long standing boundary dispute. The 1834 agreement received the consent of Congress, 4 U.S. Stat. 708 (1834).

Whereas, The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money *and the cordial co-operation of the states of New York and New Jersey* in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans; and

Whereas, Such result can best be accomplished through the *co-operation of the two states by and through a joint or common agency;*" N.Y. Unconsol. Laws §6401 (McKinney 1979); N.J.S.A. 32:1-1 (West 1963) (emphasis supplied) (A1).

As the district court observed in *Howell, supra*:

> "The Port Authority, a bi-state corporation (*Helvering, etc. v. Gerhardt*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed 1427), is a joint or common agency of the states of New York and New Jersey. It *performs governmental functions which project beyond state lines*, . . ." 34 F.Supp. at 801. (emphasis added).

D. The technical insulation of the States' tax and other general revenues from judgments against the Port Authority does not prevent the Port Authority from sharing the States' Eleventh Amendment immunity.

Although it is true that the Port Authority may not draw upon State tax revenues nor pledge the credit of the States, it is equally true that the assets it administers as agent for the two States are held for the benefit of the people of the States. The Legislatures of the Compacting States in authorizing the Port Authority to expend funds in the effectuation of various projects have expressly stated that the

undertaking of such projects is for the benefit of the people of the two States. Thus, in authorizing the Port Authority to operate petitioner, PATH, the Legislatures explicitly stated:

> "The effectuation, of . . . the Hudson tubes and the Hudson tubes extensions, . . . are and will be in all respects for the benefit of the people of the states of New York and New Jersey, for the increase in their commerce and prosperity and for the improvement of their health and living conditions; and the port authority and any subsidiary corporation incorporated for any of the purposes of this act shall be regarded as performing an essential governmental function in undertaking the effectuation thereof, and in carrying out the provisions of law relating thereto." N.Y. Unconsol. L. §6610 (McKinney 1979); 32:1-35.59 (West 1963) (A4).

Similar statements can be found in legislation authorizing the effectuation of other public projects by the Port Authority.

Furthermore, even though the Port Authority cannot legally impose any financial obligation upon the States, bi-State legislation demonstrates not only that the States view the Authority as their agent in effectuating the public projects which they authorize, but the legislation also discloses a close, meaningful relationship between State and Port Authority finances. This close financial relationship, we believe, demonstrates the extremely unrealistic, myopic view of the Second Circuit's definition of what constitutes a "state treasury".

Thus, in its early years, the Port Authority was supported by State appropriations until its revenues became adequate to meet its expenses. N.Y. Unconsol. L. §6416

(McKinney 1979); N.J.S.A. 32:1-16 (West 1963) (Pet. App., A53). And when it appeared that the Authority faced a default on its Series "A" bonds which were issued to finance its two Arthur Kill bridges – the Outerbridge Crossing and the Goethals Bridge – the States transferred their Holland Tunnel (together with its revenue flow) to the Port Authority. The Holland Tunnel was the first vehicular crossing to be constructed between the States. It was build by separate State Commissions, acting jointly, pursuant to a 1919 interstate Compact to which Congress consented, 41 U.S. Stat. 158 (1919).

In the words of Erwin W. Bard in his *The Port of New York Authority* (Columbia University Press, 1942), the Holland Tunnel was transferred in order, *inter alia*,

> "... to safeguard the Port Authority's previous commitments ... The Holland Tunnel ... earned in 1930 a net income ... of $5,034,094. By transferring its income to the Port Authority and anticipating its eventual refinancing, an annual surplus between $1,000,000 and $1,500,000 could be expected. This would be sufficient to save the bridge bonds ..." at p. 238

After noting that the transfer of the Holland Tunnel to the Port Authority was designed "to help place the Port Authority on a self-sustaining basis," the court in *United States Trust Company v. State of New Jersey*, 134 N.J. Super. 124, 141; 338 A.2d 833, 842 (L. Div. 1975), *aff'd*, 69 N.J. 253; 353 A.2d 514 (1976), *rev'd*, 431 U.S. 1 (1977), went on to say that "Simultaneously, the states enacted ... the General Reserve Fund Act." This legislation required that the Authority pool the surplus revenues it derived from the facilities it constructed or acquired through the issuance of its bonds, notes, or other obligations, and establish a general reserve fund. N.Y. Unconsol. L. §7002

(McKinney 1979); N.J.S.A. 32:1-142 (West 1963) (A8). As described in *United States Trust Company, supra:*

> "The act pledges the general reserve fund as security for ... bonds ... issued by the Authority. Surplus moneys of the Authority in excess of the general reserve fund requirements may be used for any purpose authorized by the states." *Id.*

Thus, the two Legislatures not only directed the use and flow of Port Authority revenues, but made it quite clear that any surplus revenues could be utilized as authorized by the two States.

Finally, the budget of this agency, since it is both adopted and administered by a Board of Commissioners appointed by the Governors and subject to gubernatorial veto, is hardly akin to that of any other type of political subdivision in either State. Also unlike political subdivisions, which generally are recipients of State monies, Port Authority funds, as previously noted, are used for projects authorized by the State Legislatures, thus providing the States with alternative means of financing and effectuating important public projects. For example, the Legislatures have recently authorized the Port Authority to purchase buses which it leases *without charge* to public and private transportation entities in both States, N.Y. Unconsol. L. §§7201 *et seq.* (McKinney Supp. 1989); N.J.S.A. 32:2-23.27 *et seq.* (West Supp. 1989)[7] (A11 - A13). Effectuation of the States' multimillion dollar Bus project is only possible if there are sufficient Port Authority funds available. Money being fungible, the unavailability of Port Authority funds as a result, for example, of having to pay

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[7] Significantly, for purposes of the Bus project, the port district was legislatively expanded to a radius of seventy-five miles around the Port Authority Bus Terminal. *See*, N.Y. Unconsol. L. §7202 (10) (McKinney Supp. 1989); N.J.S.A. 32:2-23.28 (10) (West Supp. 1989) (A14)

a money judgment would mean that the two States would have to look to their general treasuries to fund important projects or else deny the public the benefit of such services.[8] In that sense, then, the Port Authority's money is a component of a "state treasury" since Port Authority money is being used for the benefit of the people of the two States for projects which must be authorized by their Legislatures.

POINT II

The Finding That The Port Authority Is Not A State Agency For Eleventh Amendment Purposes Results From A Misinterpretation Of Eleventh Amendment Jurisprudence.

We respectfully submit that the Second Circuit's analysis of the "state treasury" factor is defective in two respects. As already noted, its overemphasis on this single factor misconstrues *Lake Country Estates*, *supra*. *See*, Point I, *supra*. So too, the clear implication in its opinion that the

[8] Additionally, it should be emphasized that the Port Authority, in recent years, working closely with both Governors and pursuant to legislative authorization, is spending many millions of dollars for economic development and infrastructure renewal in the two States.

For example, at the request of the Governor of New Jersey, the Port Authority has authorized expenditures, pursuant to its Marine Terminal legislation, specifically, N.Y. Unconsol. L. §6673 (McKinney Supp. 1989); N.J.S.A. 32:1-35.30 (West Supp. 1989) (A7), to provide improvements to Conrail's northern branch lines for its freight operations in order to permit the New Jersey Department of Transportation to provide a light-rail transit way to improve regional passenger transportation. Similarly, at the request of the Governor of New York, the Port Authority has authorized expenditures, pursuant to its Industrial Development legislation, specifically, N.Y. Unconsol. L. §7172(e) (McKinney 1979); N.J.S.A. 32:1-35.73(e) (West Supp. 1989) (A10), for the construction of the Center for Advanced Technology Telecommunications, which is to be a part of a major redevelopment in downtown Brooklyn known as Metrotech. Both of these expenditures, like the Bus project, do not provide revenues for the Port Authority.

phrase "state treasury" is referable only to state tax or other general state revenues constitutes a fundamental misinterpretation of Eleventh Amendment jurisprudence.

More specifically, the opinion of the Second Circuit purports to analyze the question of Eleventh Amendment immunity under the factors this Court delineated in *Lake Country Estates* and, indeed, it grudgingly acknowledged that the case for Port Authority immunity was stronger than it was for the agency before this Court in *Lake Country Estates*. *Feeney*, 873 F.2d at 631. Nevertheless, the Second Circuit went on to hold "that the Port Authority, and therefore PATH, is not a state agency for Eleventh Amendment purposes", based on one factor, to wit: whether a judgment against PATH would put the "state treasury" at risk of liability (*Id.* at 630).

But, this Court has never held this one factor to be the *sine qua non* for immunity. Indeed, in *Lake Country Estates*, in commenting on this factor as but one of the elements to be weighed, this Court made the simple observation that "some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." 440 U.S. at 400-01 (footnote omitted). But, nowhere in the *Lake Country Estates* opinion is there any indication that this factor is, *by itself*, controlling.[9] Indeed, in *Pennhurst State School and*

[9] Although the Second Circuit had to acknowledge that the "state treasury" factor could not be "exclusively determinative", *Feeney*, 873 F.2d at 631, quite obviously, it gave only lip service to this concept. Thus, it reluctantly would acknowledge but two factors, i.e., method of appointment of commissioners by the states and the gubernatorial veto, as evidencing State agency status (*Id.*). In contrast, the Third

(Footnote continued)

Hospital v. Halderman, 465 U.S. 89, 101 n.11 (1984), this Court held that suits against the sovereign are found not only where the judgment "would expend itself on the public treasury", but also where the public administration would be interfered with or a judgment would either compel or restrain the government in its actions, citing, *Dugan v. Rank*, 372 U.S. 609, 620 (1963). In point of fact, suits seeking injunctive relief against the State are as much barred by the Eleventh Amendment as are suits for money damages. *See, inter alia, Alabama v. Pugh*, 438 U.S. 781, 782 (1978).

Moreover, the Second Circuit's overly restrictive view of what constitutes a "state treasury" is a result of a fundamental misinterpretation of Eleventh Amendment jurisprudence. The purpose of the Eleventh Amendment is not merely to protect "public" funds. If it were, cities and counties, whose funds are just as "public", should be entitled to invoke the immunity. Yet they are not. *See, Lake Country Estates*, 440 U.S. at 401; *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S 274, 280-1 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).[10] Rather, the Eleventh Amendment, as this Court has counseled time and again, embodies the recognition of state sovereignty as a limitation upon Article III judicial power.

Circuit in *PBA*, *supra*, was able to rely upon a host of additional "significant indicia of state control over the Authority", to wit: the requirement of annual reports to the state legislatures, the requirement of legislative concurrence to changes in Port Authority rules and regulations, the requirement of express legislative authorization for Port Authority projects, as well as other factors establishing that "the Authority is a direct agency of the states . . ." 819 F.2d at 417 – all evidently disregarded by the Second Circuit.

[10] The *Lincoln County* Court did not really articulate a reason for differentiating between the State and political subdivisions for this purpose. Apparently what has developed is a purely historical distinction.

Indeed, in *Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S 459 (1945), cited in *Lake Country Estates*, *supra*, and the case most often cited for the importance of the "state treasury" factor, this Court's focus upon the potential liability of the State treasury was for the purpose of determining who was, in fact, the real party in interest since individuals were nominal defendants, and a point apparently had been raised that the presence of such individuals as named defendants created federal court jurisdiction. This Court's words are clear and admit of no other interpretation:

> "And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." (citations omitted) 323 U.S. at 464.

Similarly, in *Edelman v. Jordan*, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974), cited by the Second Circuit for this proposition, 873 F.2d at 633, again the focus on the "state treasury" was for the purpose of identifying the real party in interest where State officials were the only named defendants.[11] Furthermore, both *Edelman* and

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[11] The *Feeney* court cites language in *Edelman* to the effect that:

> " '[T]he rule [that] has evolved [is] that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.' 415 U.S. at 663." 873 F.2d at 631.

While that proposition is certainly true, it does not necessarily then follow that if a judgment is not paid from the State's general tax coffers, Eleventh Amendment immunity cannot be found under *Lake Country Estates*, *supra*. Thus, as previously explained, at no time does PATH concede that the Port Authority's treasury, dedicated to State

(Footnote continued)

Ford preceded *Lake Country Estates* with its specific test for Eleventh Amendment immunity.

That the protection of state treasury funds is not this Court's *raison d'etre* for Eleventh Amendment immunity is also well-established by the fact that the Eleventh Amendment is not necessarily a bar to such funds being expended in an award of attorney's fees. *See*, *Kentucky v. Graham*, 473 U.S. 159, 170-71 (1985); *Hutto v. Finney*, 437 U.S. 678, 695 (1978). Nor is the Eleventh Amendment a defense when these funds are expended in obedience to the dictates of an injunction mandating that State officials conform their conduct to federal law. *See*, *Quern v. Jordan*, 440 U.S. 332, 338 (1979); *see also*, *Milliken v. Bradley*, 433 U.S. 267, 289 (1977).

The fact is, as this Court repeatedly has emphasized, that the Eleventh Amendment finds its purpose in the vindication of State sovereign prerogatives. *See*, *Pennhurst*, *supra*, "we must be guided by '[t]he principles of federalism that inform Eleventh Amendment doctrine' ", 465 U.S. at 100, citing *Hutto*, *supra*, 437 U.S. at 691. If that is so, of what possible moment is it in how many or in what particular coffers the State chooses to divide up its assets? PATH respectfully submits that the test developed in *Ford*, *supra*, to determine the real party in interest to a lawsuit should not be turned into a vehicle for federal court interference with the manner in which a State orders its fiscal affairs.

Thus, to the extent that there are cases at the district and circuit court levels that turn upon the "state treasury" factor, such factor nevertheless is inappropriately applied to disqualify an entity like the Port Authority, which, as

governmental purposes, legislatively constrained in its uses, and subject to the gubernatorial veto, is not a State treasury within the meaning of *Lake Country Estates*.

we fully established in Point I, *supra*, and, as found by the Third Circuit, clearly "functions as an agency of the state . . . ." *PBA*, 819 F.2d at 417.

In point of fact, contrary to the Second Circuit's belief, far from stressing the "state treasury" factor, this Court's opinion in *Lake Country Estates*, is more properly read as being directed at, not surprisingly in view of the Eleventh Amendment's deference to State sovereignty, the intention of the States in creating the agency, with the agency's financial structure being just one factor in gleaning that intention. Thus, this Court has made it clear that the appropriate judicial inquiry is whether:

> ". . . there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose. . . ." *Lake Country Estates*, 440 U.S. at 401.

Compare *PBA*, *supra*:

> ". . . although the Authority is no longer directly funded by the states, we conclude that the *history* of its financial structure, and the *statutory constraints* placed on the use of its funds, indicate that *the Authority is considered an arm of the states by New York and New Jersey*." 819 F.2d at 416 (emphasis supplied).[a]

[a] It should be noted that the Second Circuit has misinterpreted the Third Circuit's decision in *PBA* to the extent that it opined that the *PBA* holding was based on what it deemed to be an erroneous finding that two States were statutorily obligated to make appropriations should a judgment against the Port Authority deplete its resources. *Feeney*, 873 F.2d at 632. That particular language in *PBA*, however, is just as consistent with a finding that the States, in carrying out their

(Footnote continued)

In sum, *Lake Country Estates* clearly established that the focus of judicial inquiry in Eleventh Amendment claims should be directed at determining the intent of the Compacting States. In the case of the Port Authority, the requisite "good reason to believe" that the States intended to create an agency cloaked with Eleventh Amendment immunity is self-evident. For irrespective of its current financial self-sufficiency, in forming the Port Authority in 1921, the States of New York and New Jersey, in fact, did create, and Congress consented to the creation of, an agency that was, in the absence of bi-State legislative consent to suit even in the courts of the Compacting States, "totally immune from suit". *PBA*, 819 F.2d at 418; *accord*, *Howell*, 34 F.Supp. at 801; *Trippe*, 14 N.Y.2d at 123; 198 N.E.2d at 586.

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solemn obligations pursuant to the bi-State Compact, would make such an appropriation. In essence, this is what occurred, when, as previously pointed out, the Port Authority faced the prospect of financial ruin due to an impending default on its early bridge bonds. As we have seen, the States then came to its rescue by their transfer of the financially successful Holland Tunnel to the Authority.

So too, the Second Circuit for some reason finds significant the fact that any State appropriation to cover judgments against the Port Authority could not be made "without gubernatorial consent." *Id.* How requiring the consent of the highest elected State official to such an appropriation which, after all, is an ordinary incident of the legislative process, negates State agency status is something of a mystery.

In any event, the *PBA* decision in no way turned upon any such statutory obligation. In fact, the Third Circuit specifically noted that:

> ". . . the Authority's current funding structure does not provide conclusive evidence that the Authority is an agency of the state . . . ." 819 F.2d at 416 (emphasis supplied).

POINT III

The Second Circuit Ignored The Standards Set Forth By This Court In Finding A Waiver of Eleventh Amendment Immunity.

As noted above, irrespective of the Port Authority's present financial self-sufficiency, in creating an entity totally immune from suit, the two States, by definition, intended to create an entity that shared their Eleventh Amendment immunity.

Thus, the question of whether PATH may interpose Eleventh Amendment immunity against a FELA claim comes down to whether in 1951, some thirty years after the States created the Port Authority,[13] they waived its Eleventh Amendment immunity in enacting the Port Authority's suability statute, N.Y. Unconsol. L. §§7101 *et seq.* (McKinney 1979); N.J.S.A. 32:1-157 *et seq.* (West 1963) (Pet. App., A54).

The Second Circuit recognized that this Court's test for a waiver of Eleventh Amendment immunity is a stringent one:

> "We acknowledge that the standard for determining whether a state has waived its Eleventh Amendment immunity is strict. In *Atascadero*

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[13] In *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), Congressional consent to a compact containing a "sue and be sued" provision was found to have effected an abrogation of Eleventh Amendment immunity. 359 U.S. at 281-82. To the extent the rule of *Petty* is still good law, in light of this Court's later Eleventh Amendment decisions, *see*, *Leadbeater v. Port Authority Trans-Hudson Corporation*, 873 F.2d 45, 49-50, *rehg.* and *rehg. en banc denied* (3d Cir. 1989), Congressional abrogation certainly cannot be inferred on the basis of Congressional consent granted thirty years prior to the States' enactment of the Port Authority's suability statute. *Petty* is thus amply distinguishable from the instant case.

> State Hospital v. Scanlon, 473 U.S. 234, 239-40 (1985), *reh'g denied*, 473 U.S. 926 (1985), the Supreme Court stated that 'a State will be deemed to have waived its immunity "only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction' " ' (citation omitted). *See also*, *Edelman v. Jordan*, 415 U.S. at 673." 873 F.2d at 632.

Nevertheless, the Second Circuit somehow concluded that the Legislatures both implicitly and expressly waived the Port Authority's Eleventh Amendment immunity in the suability statute.

What the Second Circuit seems to be saying is that the Eleventh Amendment was implicitly waived by the inclusion of a reference to *Howell*, 34 F.Supp. 797, in the legislative history of the suability statute. *Feeney*, 873 F.2d at 632-33. *Howell*, however, was merely one case included in a long list of decisions, which the Second Circuit had to concede "appears to be exclusively sovereign immunity cases" (*id.* at 633), in which:

> "the courts concluded that in the absence of an express consent by the states to suit against the Port Authority, the Port Authority shared the governmental immunity of the states themselves." 1950 N.Y. Legislative Annual 204 (footnote omitted).

The Second Circuit went on to find that since "*Howell* concluded that the Port Authority was a state agency rather than a political subdivision", *Feeney*, 873 F.2d at 633, the States therefore must have intended to waive the Eleventh Amendment immunity characteristic of a State agency. The Second Circuit's conclusion thus flies directly in the

face of the well-settled principle, recently reiterated by this Court, that "a State does not waive Eleventh Amendment immunity in federal courts merely by waiving sovereign immunity in its own courts." *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 473-74 (1987). (citation omitted)

This Court's recent decision in *Dellmuth v. Muth*, ____ U.S. ____; 109 S.Ct. 2397 (1989) further demonstrates that the Second Circuit's reliance upon the Legislative Annual's reference to the overturning of *Howell* is misplaced. As this Court stated in *Dellmuth*, with respect to Congressional abrogation of Eleventh Amendment immunity, for which unmistakably clear language also is required:

> "In particular, we reject the approach of the Court of Appeals, according to which, '[w]hile the text of the federal legislation must bear evidence of such an intention, the legislative history may still be used as a resource in determining whether Congress' intention to lift the bar has been made sufficiently manifest.' . . . . Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met." 109 S.Ct at 2401 (citation omitted).

Similarly, these stringent standards for finding a waiver of Eleventh Amendment immunity do not support the Second Circuit's holding that the Legislatures' attempt in N.Y. Unconsol. L. §7106 (McKinney 1979); N.J.S.A.

32:1-162 (West 1963)[14] to restrict *venue* to federal district courts lying within the Port District was an "explicit waiver, albeit partial" of Eleventh Amendment immunity. *Feeney*, 873 F.2d at 633.

In *Leadbeater*, *supra*, the Third Circuit answered the very same contention, to wit:

> "The defendant suggests, in opposition, that the provision for venue in certain federal districts is intended to apply to actions over which there is some basis for federal jurisdiction independent of the consent provisions. It is not apparent to us that the venue provision applies in such cases, where consent to suit is not required. ***But whatever the purpose of this part of Section 32:1-162, we think the Supreme Court, by requiring proof of consent by 'overwhelming implication,' mandates that there be much more than inclusion of a reference to a federal judicial district in a venue provision.***" 873 F.2d 45, 49.[15] (emphasis supplied)

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[14] The text reads in relevant part as follows:

> "The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the Port of New York District. The port authority shall be deemed to be a resident of each such county or judicial district . . . ." (Pet. App., A54-A55).

[15] In this regard, it should be remembered that the parameters of Eleventh Amendment immunity were far less well-settled in 1950-1951 than they are now. Indeed, it was not until *Welch*, *supra*, that this Court clearly overruled a precedent of nearly 25 years standing, *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S.

(Footnote continued)

The Third Circuit in *Leadbeater* clearly is correct. Whatever may be the efficacy of the Legislatures' attempt in §7106 to control the choice of *venue*,[16] it strains reason to believe that the Legislatures intended to do something as momentous as waive a constitutionally-protected right *sub silentio* by the mere inclusion of a reference to federal judicial districts in a general purpose *venue* provision.[17] Quite obviously, the Legislatures can be presumed to have known how to consent to suit in federal court had that been their purpose. In fact, the language of the Legislative Annual cited above makes it perfectly clear that the question of Eleventh Amendment immunity was not addressed.

In this regard, we note that this Court just recently took occasion to reiterate in *Welch*, *supra*, that:

> " '[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights,' *Edelman v. Jordan*, *supra*, 415 U.S., at 673, 94 S.Ct., at 1360." 483 U.S. 468, 473.

In the instant case, the Second Circuit had to concede that "use of the term 'venue' [in §7106] is somewhat anomalous

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184 (1964), to the effect that Eleventh Amendment immunity could be waived merely by a State participating in a Congressionally-regulated activity. *Welch*, 483 U.S. at 478.

[16] But *see*, *Brophy v. Consolidated Rail Corporation*, Civ. A. No. 85-4201, 1986 W.L. 11686 (E.D. Pa.)

[17] The venue language of §7106 is neither a consent to, nor a waiver of, anything. The waiver of sovereign immunity is contained in §7101. The subsequent provisions of the suability statute for the most part serve to condition and limit the consent. See, generally, *inter alia*, *Trippe*, 14 N.Y.2d 119; 198 N.E.2d 585; *Luciano v. Fanberg Realty Co.*, 102 A.D.2d 94; 475 N.Y.S.2d 854 (1st Dept. 1984). Thus, there is no basis for the Second Circuit's finding that §7106 effected a "partial" waiver of Eleventh Amendment immunity.

in the Eleventh Amendment context", 873 F.2d at 633. As this Court recently explained in *Dellmuth*, *supra*:

> " . . . imperfect confidence will not suffice given the special constitutional concerns in this area." 109 S.Ct. at 2402.

Thus, as the Third Circuit correctly found in *Leadbeater*, *supra*, "somewhat anomalous" statutory language simply cannot satisfy the "express language" or "overwhelming implication" standards for waiver of Eleventh Amendment immunity established by this Court.

CONCLUSION

The Orders of the Court of Appeals Should Be Reversed and The Complaints Dismissed for Lack of Subject Matter Jurisdiction.

Dated: New York, New York
December 14, 1989

Respectfully submitted,

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APPENDIX

N.Y. Unconsol. L. §6401; N.J.S.A. §32:1-1

§6401. Preamble

Whereas, In the year eighteen hundred and thirty-four the states of New York and New Jersey did enter into an agreement fixing and determining the rights and obligations of the two states in and about the waters between the two states, especially in and about the bay of New York and the Hudson River; and

Whereas, Since that time the commerce of the port of New York has greatly developed and increased and the territory in and around the port has become commercially one center or district; and

Whereas, It is confidently believed that a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey; and

Whereas, The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money and the cordial co-operation of the states of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans; and

Whereas, Such result can best be accomplished through the co-operation of the two states by and through a joint or common agency.

Now, therefore, The said states of New Jersey and New York do supplement and amend the existing agreement of eighteen hundred and thirty-four in the following respects:

COMPACT ARTICLE XVI

N.Y. Unconsol. L. §6417; N.J.S.A. §32:1-17

§6417. Quorum; veto power

Unless and until otherwise determined by the action of the legislatures of the two states, no action of the port authority shall be binding unless taken at a meeting at which at least three of the members from each state are present, and unless a majority of the members from each state present at such meeting but in any event at least three of the members from each state, shall vote in favor thereof. Each state reserves the right to provide by law for the exercise of a veto power by the governor thereof over any action of any commissioner appointed therefrom.

COMPACT ARTICLE XVIII

N.Y. Unconsol. L. §6419; N.J.S.A. §32:1-19

§6419. Rules and regulations

The port authority is hereby authorized to make suitable rules and regulations not inconsistent with the constitution of the United States or of either state, and subject to the exercise of the power of congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both states, shall be binding and effective upon all persons and corporations affected thereby.

N.Y. Unconsol. L. §6610; N.J.S.A. §32:1-35.59

§6610. Purpose

The effectuation of the world trade center, the Hudson tubes and the Hudson tubes extensions, or any of such facilities constituting a portion of the port development project, are and will be in all respects for the benefit of the people of the states of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and the port authority and any subsidiary corporation incorporated for any of the purposes of this act shall be regarded as performing an essential governmental function in undertaking the effectuation thereof, and in carrying out the provisions of law relating thereto.

N.Y. Unconsol. L. §6612; N.J.S.A. §32:1-35.61

§6612. General powers; local laws; subsidiary corporation

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Nothing in this act shall be deemed to prevent the port authority from establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project through wholly owned subsidiary corporations of the port authority or from transferring to or from any such corporations any moneys, real property or other property for any of the purposes of this act. If the port authority shall determine from time to time to form such a subsidiary corporation it shall do so by executing and filing with the secretary of state of New York and the secretary of state of New Jersey a certificate of incorporation, which may be amended from time to time by similar filing, which shall set forth the name of such subsidiary corporation, its duration, the location of its principal office, and the purposes of the incorporation which shall be one or more of the purposes of establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project. The directors of such subsidiary corporation shall be the same persons holding the offices of commissioners of the port authority. Such subsidiary corporation shall have all the powers vested in the port authority itself for the purposes of this act except that it shall not have the power to contract indebtedness. Such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions and activities. Such subsidiary corporation shall be subject to the restrictions and limitations to which the port authority may be subject, including, but not

limited to the requirement that no action taken at any meeting of the board of directors of such subsidiary corporation shall have force or effect until the governors of the two states shall have an opportunity, in the same manner and within the same time as now or hereafter provided by law for approval or veto of actions taken at any meeting of the port authority itself, to approve or veto such action. Such subsidiary corporation shall be subject to suit in accordance with section nine of this act and chapter three hundred one of the laws of New York of nineteen hundred fifty and chapter two hundred four of the laws of New Jersey of nineteen hundred fifty-one as if such subsidiary corporation were the port authority itself. Such subsidiary corporation shall not be a participating employer under the New York retirement and social security law or any similar law of either state and the employees of any such subsidiary corporation, except those who are also employees of the port authority, shall not be deemed employees of the port authority.

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N.Y. Unconsol. L. §6673; N.J.S.A. 32:1-35.30

§6673 Definitions

The following terms as used herein shall mean:

"Marine terminals" shall mean developments, consisting of one or more piers, wharves, docks, bulkheads, slips, basins, vehicular roadways, railroad connections, side tracks, sidings or other buildings, structures, facilities or improvements, necessary or convenient to the accommodation of steamships or other vessels and their cargoes or passengers and shall also mean waterfront development projects. It shall also include such highway projects in the vicinity of a marine terminal providing improved access to such marine terminal as shall be designated in legislation adopted by the two states. Notwithstanding any contrary provision of law, general, special or local, it shall also mean railroad freight projects related or of benefit to a marine terminal or which are necessary, convenient or desirable in the opinion of the port authority for the protection or promotion of the commerce of the port district, consisting of railroad freight transportation facilities or railroad freight terminal facilities; and any equipment, improvement, structure or facility or any land, and any building, structure, facility or other improvement thereon, or any combination thereof, and all real and personal property in connection therewith or incidental thereto, deemed necessary or desirable in the opinion of the port authority, whether or not now in existence or under construction, for the undertaking of such railroad freight projects.

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N.Y. Unconsol. L. §7002; N.J.S.A. §32:1-142

§7002. Establishment of general reserve fund

In all cases where the port authority has raised or shall hereafter raise moneys for the establishment, acquisition, construction or effectuation of terminal and/or transportation facilities by the issue and sale of bonds legal for investment, as herein defined and limited, the surplus revenues received by or accruing to the port authority from or in connection with the operation of such terminal and/or transportation facilities built in whole or in part by the proceeds of the sale of such bonds shall be pooled and applied by it to the establishment and maintenance of a general reserve fund in an amount equal to one-tenth (1/10) of the par value of all bonds legal for investment, as herein defined and limited, issued by the port authority and currently outstanding. The moneys in the said general reserve fund may be pledged in whole or in part by the port authority as security for or applied by it to the repayment with interest of any moneys which it has raised or may hereafter raise upon any bonds, legal for investment, as herein defined and limited, and made and issued by it for any of its lawful purposes; and the said moneys may be applied by the port authority to the fulfillment of any other undertakings which it has assumed or may or shall hereafter assume to or for the benefit of the holders of any of such bonds.

Any surplus revenues not required for the establishment and maintenance of the aforesaid general reserve fund shall be used for such purposes as may hereafter be directed by the two said states.

N.Y. Unconsol. L. §7071; N.J.S.A. §32:2-31

§7071. Examination of books and accounts

Notwithstanding the provisions of any general or special statutes, the comptroller of the state of New York and the comptroller of the state of New Jersey and their legally authorized representatives are hereby authorized and empowered from time to time to examine the accounts and books of the port of New York authority, including their receipts, disbursements, contracts, leases, sinking fund, investments and such other items referring to their financial standing and receipts and disbursements as such comptroller may deem proper. Such examination may be made by either comptroller at any time or by both comptrollers acting together.

N.Y. Unconsol. L. §7172; N.J.S.A. 32:1-35.73

§7172 Definitions

The following terms as used herein shall have the following meanings:

* * *

e. "Industrial development project or facility" or "port district industrial development project or facility" shall mean any equipment, improvement, structure or facility or any land, and any building, structure, facility or other improvement thereon, or any combination thereof, and all real and personal property, located within the New York portion of the port district or within a municipality in the New Jersey portion of the port district which qualified for state aid under the provisions of P.L., 1971, C.64 as most recently supplemented by P.L., 1978, C.14 or which may hereafter qualify for such aid, including, but not limited to, machinery, equipment and other facilities deemed necessary or desirable in connection therewith, or incidental thereto, whether or not now in existence or under construction, which shall be considered suitable by the port authority for manufacturing, research, non-retail commercial or industrial purposes within an industrial park, or for purposes of warehousing or consumer and supporting services directly related to any of the foregoing or to any other port authority project or facility; and which may also include or be an industrial pollution control facility or a resource recovery facility, provided that no such industrial development project or facility may include or be a facility used for the storage

of chemicals, fuel or liquified natural gas unless incidental to the effectuation of such industrial development project or facility;

* * *

N.Y. Unconsol. L. §7201; N.J.S.A. §32:2-23.27

§7201. Legislative findings and determinations

The states of New York and New Jersey hereby find and determine that:

(1) the efficient, economical and convenient mass transportation of persons to, from and within the port of New York district as defined in the compact between the two states dated April thirtieth, nineteen hundred twenty-one (hereinafter called the "port district") is vital and essential to the preservation and economic well being of the northern New Jersey-New York metropolitan area;

(2) in order to deter the economic deterioration of the northern New Jersey-New York metropolitan area adequate facilities for the mass transportation of persons must be provided and buses are and will remain of extreme importance in such transportation;

(3) the provision of mass transportation including bus transportation in urban areas has become financially burdensome and may result in the additional curtailment of significant portions of this essential public service;

(4) the economic viability of the existing facilities operated by the port authority of New York and New Jersey (hereinafter called the "port authority") is dependent upon the effective and efficient functioning of the transportation network

of the northern New Jersey-New York metropolitan area and access to and proper utilization of such port authority facilities would be adversely affected if users of bus transportation were to find such transportation unavailable or significantly curtailed;

(5) buses serving regional bus routes and feeder bus routes and ancillary bus facilities constitute an essential part of the mass commuter facilities of the port district;

(6) the continued availability of bus transportation requires substantial replacement of and additions to the number of buses presently in use in the northern New Jersey-New York metropolitan area;

(7) the port authority which was created by agreement of the two states as their joint agent for the development of transportation and terminal facilities and other facilities of commerce of the port district and for the promotion and protection of the commerce of their port, is a proper agency to provide such buses to each of the two states and such provision of buses by the port authority is in the interest of the continued viability of the facilities of the port authority, and is in the public interest;

(8) the operation of the facilities of the port authority, including but not limited to the port authority bus terminal at forty-first street and eighth avenue in New York county in the city and state of New York and the extension thereto currently under construction (hereinafter called the "bus terminal"), the George Washington bridge

bus station and the provision of buses and ancillary bus facilities pursuant to this act involve the exercise of public and essential governmental functions which must be performed by the two states or any municipality, public authority, agency, or commission of either or both states;

(9) the revision to the port authority bridge and tunnel toll schedules which was effective May fifth, nineteen hundred seventy-five, is expected to result in additional revenues to the port authority sufficient to support the financing with consolidated bonds of the port authority of approximately four hundred million dollars for passenger mass transportation capital projects (hereinafter called "passenger facilities"), approximately one hundred sixty million dollars thereof being allocated to the extension to the bus terminal, with the remaining two hundred forty million dollars to be allocated on the basis of one hundred twenty million dollars in each state for passenger facilities, including but not limited to the acquisition, development and financing of buses and related facilities, as determined by each such state and the port authority acting pursuant to legislative authorization and commitments to the holders of port authority obligations; and

(10) the port authority's function as a regional agency of the two states makes it appropriate that line-haul regional bus route passenger facilities be equipped pursuant to this act with buses and ancillary bus facilities and that the need for development and equipment of such routes be satisfied on a priority basis.

of chemicals, fuel or liquified natural gas unless incidental to the effectuation of such industrial development project or facility;

• • •

N.Y. Unconsol. L. §7202; N.J.S.A. 32:2-23.28

§7202 Definitions

• • •

(10) "regional bus area" shall mean that area in the states of New York and New Jersey which lies within a radius of seventy-five miles of the bus terminal.

N.J.S.A. 32:2-5

32:2-5 Removal

Any commissioners of the port authority from this state may be removed upon charges and after a hearing by the senate.

Chapter 422, Laws of New York, 1930

§4. Removal

Any commissioners of The Port of New York Authority from the state of New York may be removed upon charges and after a hearing by the governor.

No. 89-386

Supreme Court, U.S.
FILED
JAN 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PORT AUTHORITY
TRANS-HUDSON CORPORATION,

Petitioner,

-against-

PATRICK FEENEY,

Respondent.

PORT AUTHORITY
TRANS-HUDSON CORPORATION,

Petitioner,

-against-

CHARLES T. FOSTER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF RESPONDENTS PATRICK FEENEY AND CHARLES T. FOSTER

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QUESTIONS PRESENTED

1. Is the Petitioner, Port Authority Trans-Hudson Corporation, immune from suit in the federal courts by virtue of the protection afforded by the Eleventh Amendment?

2. Has the immunity afforded by the Eleventh Amendment been waived by or on behalf of the Petitioner, Port Authority Trans-Hudson Corporation?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The doctrine of Sovereign Immunity is based upon the Eleventh Amendment to the Constitution of the United States, and provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

Portions of the legislation establishing and governing the Port Authority of New York and New Jersey, N.Y. Unconsol. Laws § 6401 et seq. (McKinney 1979) are set forth in the Pet. App., A51-A55. Other portions of the legislation are set forth in the Appendix to the Brief of the petitioner (A1-A14). Additional portions of the legislation, specifically relied upon herein, are reproduced in the Appendix to this Brief (A1-A11).

STATEMENT

The Port Authority of New York and New Jersey was created in 1921 by an interstate Compact between the states of New York and New Jersey, as "a body corporate and politic". N.Y. Unconsol. Laws section 6404 (McKinney 1979) (Pet. App., A51) The Port Authority Trans-Hudson Corporation ("PATH") is a wholly-owned subsidiary of the Port Authority and operates railroad and rail facilities, as well as various other facilities including bridges, tunnels, air terminals and other mass transportation facilities. Respondents Feeney and Foster instituted their actions for damages for personal injuries allegedly

sustained in the course of their employment, pursuant to the Federal Employer's Liability Act 45 U.S.C. § 51 et seq. and other related sections.

PATH moved to dismiss the complaints in both cases, pursuant to FED. R. CIV. P. 12(c) seeking an order of dismissal of the complaint due to a lack of subject matter jurisdiction, in that PATH cannot be sued in a Federal Court pursuant to the dictates of the Eleventh Amendment. Both motions were granted by the district court, and the Court of Appeals for the Second Circuit reversed, finding that the Port Authority is not a state agency as far as Eleventh Amendment purposes are concerned, and alternatively, that even were it to be considered a state agency, it had specifically waived its Eleventh Amendment immunity. (Pet. App., A10-A21). The court reasoned that, under the authority of *Lake Country Estates, Inc. v Tahoe Regional Planning Agency,* 440 U.S. 391 (1979), a political subdivision does not necessarily enjoy the Eleventh Amendment immunity a state enjoys, and that PATH is a municipal corporate instrument, that was self-sustaining and performed many local functions. (Pet. App., A-13). In applying the various criteria found in *Lake Country Estates,* the Second Circuit found most persuasive the fact that a judgment against PATH would not put the state treasury of either New York or New Jersey at risk (Pet. App., A-14).

On the issue of waiver, the Second Circuit determined that PATH had waived its Eleventh Amendment immunity pursuant to sections 7101 and 7106 N.Y. Unconsol. Laws (McKinney 1979). (Pet. App., A16-A18).

A petition for rehearing containing a suggestion that the action be reheard in banc was filed by the Petitioner. The petition for a rehearing was denied and the suggestion for rehearing in banc was transmitted to the judges of the court and no judge requested that any vote be taken. (Pet. App., A1-A2).

SUMMARY OF ARGUMENT

The decision of the Second Circuit below was based upon the finding that; first, the Port Authority is not an agency of the state and accordingly is not to be afforded the immunity of the Eleventh Amendment; and second, assuming for the moment that the Port Authority enjoys Eleventh Amendment immunity, nevertheless it has been waived.

As to the finding that the Port Authority is not a state agency for Eleventh Amendment immunity purposes, reference to the various sections of the legislation establishing and governing the Port Authority (N.Y. Unconsol. Laws § 6401 et seq. McKinney 1979) support the finding of the court below that the Port Authority is not entitled to the immunity afforded by the Eleventh Amendment. The Eleventh Amendment applies only to states and does not apply to political subdivisions or municipal corporate entities such as the Port Authority. Further, The Port Authority is self-sustaining, operates independently of the states of New York or New Jersey, and any judgment obtained against the Port Authority would not be enforceable against the state treasury.

On the second issue, the concept of waiver, the Port Authority has specifically consented to be sued, in a broadly worded consent statute N.Y. Unconsol. Laws section 7101 (McKinney 1979) and further has *specifically* consented to the courts of the *United States* as a proper forum for such suits (N.Y. Unconsol. Laws section 7106 McKinney 1979) This language has only one plain and unequivocal meaning: the U. S. District Court is a proper forum for suits against the Port Authority. To find otherwise goes against the plain and obvious meaning of the statutes and the ordinary and everyday meaning accorded to such language.

ARGUMENT

POINT I

THE PORT AUTHORITY IS NOT ENTITLED TO IMMUNITY FROM SUITS IN THE FEDERAL COURTS PURSUANT TO THE PROTECTIONS AFFORDED BY THE ELEVENTH AMENDMENT

The Eleventh Amendment prohibits a state from being sued in the Federal Court. However, the protection of the Eleventh Amendment does not extend to political subdivisions or municipal corporations. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, at 280. Further, as this Court recently stated in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), just because the approval of Congress is required regarding the establishment of a Compact, such as between the states of New York and New Jersey, that set up the Port Authority, does not mean that the Port Authority automatically gets the

same immunity that is afforded either of the states. This court stated that the Eleventh Amendment protection is available *only* to one of the United States. If one of the states creates an agency that is comparable to a county or a municipality, there is no Eleventh Amendment immunity (at 401). This court went on to state that it has "consistently refused" to extend the protections of the Eleventh Amendment to political subdivisions even though such entities might exercise a "slice of state power." (at 401). Without "good reason" to believe that the agency or political sub-division was intended to enjoy the special protections of the Eleventh Amendment that the creating states, in this case, New York and New Jersey, themselves enjoy, and further that the Congress of the United States concurred in that purpose, then there is "no justification" for extending the specifically-worded limitations of the Eleventh Amendment that restrict its protections to "one of the United States". (at 401).

Using the rules and guidelines of this Court in *Lake Country Estates*, it is clear that the Port Authority does not enjoy the immunity provided by the Eleventh Amendment. Further, reference to the statutes regulating, establishing and controlling the Port Authority clearly establish that the Port Authority is not an agency of the state. Section 6404 (Pet. App., A-51) describes the Port Authority as a "body corporate and politic". This section does not state that the Port Authority is to assume the identity of a state agency, with the rights and immunities that an agency enjoys. Most recently, in *Will v. Michigan Department of State Police et al.*, 491 U.S. ___ (June 15, 1989), this Court examined the legal and long-standing definition of "bodies politic and corporate" and stated

that it means "corporations, both private and public (municipal), and (is) *not to include the States.*" (emphasis supplied).

Other sections of the legislation clearly establish that the Port Authority is to be considered an independent corporate entity, separate and apart with specific functions, duties, powers and responsibilities particularly unique to it. Section 6407 (Pet. App., A-52) states that the Port Authority "shall constitute a body, both corporate and politic, with full power and authority . . . ". Under this section, the Port Authority has the power to construct, lease, and operate any terminal or transportation facility, to purchase, to "make charges for the use thereof", as well as to own, hold, lease, and operate real property and personal property, as well as the authority to borrow money, and issue bonds and mortgages. In short, the Port Authority is an independent corporate body which has the sole and independent power, discretion and authority to operate various facilities, whether they be railroad, marine and air terminals or other transportation facilities, *independently* of the states of New York and New Jersey.

Pursuant to sections 6406 N.Y. Unconsol. Laws (McKinney 1979) (A1), the commissioners of the Port Authority constitute a board and are empowered to adopt by-laws "for its management". Neither the state of New York nor New Jersey issue any laws, rules or regulations regarding the operation of the Port Authority or any of its facilities. In its own eyes, the Port Authority describes itself as an independent, self-sustaining and self-supporting entity:

> "Unlike many other authorities and governmental agencies, the Port Authority, by law, must be self-supporting. It has neither the power to tax nor the right to pledge the credit of either state in support of its general obligations.
>
> The Port Authority pays its own way for operations and capital investment, pooling revenues earned from its facilities through rents, fees, fares, tolls and other user charges. It finances new construction, major improvements and repairs by selling its bonds and other obligations. *Comprehensive Annual Financial Report of the Port Authority of New York and New Jersey for the Year Ended December 31, 1987*, p.10."

Not only does the Port Authority "pay its own way" but pursuant to section 7002 (Brief for Petitioner at A8) the Port Authority places its surplus revenues, into a general reserve fund. The Port Authority is empowered to pledge these monies as security for bonds that are issued in its own name. Pursuant to section 7031 N.Y. Unconsol. Laws (McKinney 1979) (A8) not only is the Port Authority empowered to issue its own bonds, but by law, both the states of New York and New Jersey agree that any bond issued by the Port Authority is deemed to be a negotiable instrument. Further, it has been held that such bonds issued by the Port Authority are not to be considered obligations of the state of New York. (see 1930 Report of the Att'y Gen 124). Under section 7053 N.Y. Unconsol. Laws (McKinney 1979) (A9), bonds issued by the Port Authority are the "direct and general obligations of the port authority" and to be secured by the general reserve fund referred to previously. Thus it becomes clear that the Port Authority is not only self-sufficient but self-supporting and operates independently of either the states of

New York or New Jersey. Certainly it cannot be considered an agency for Eleventh Amendment purposes.

Under § 6951 (N.Y. Unconsol. Laws McKinney 1979) (A7), the Port Authority is empowered to sell real property *in its own name*, and issues bargain and sale deeds that are executed by the chairman or vice chairman or other officers of the Port Authority and "attested by the Secretary thereof." Pursuant to § 6407 (Pet. App., A-52) the Port Authority is also empowered to own, hold, lease and/or operate real or personal property. In addition, pursuant to § 6612 (A4), any facility owned, controlled or operated by the Port Authority is exempt from and beyond the control of either State or any agency, commission or municipality of the States. This section provides that all details regarding "financing, leasing, rentals, tolls, fares, fees and other charges, rates, contracts and services" of various facilities of the Port Authority "shall be within its sole discretion and its decision." The section further provides that such decisions "shall be controlling and conclusive." (A4)

As further indicia of the non-agency status of the Port Authority, § 6466 (N.Y. Unconsol. Laws McKinney 1979) (A2), provides that the Port Authority is entitled to bring lawsuits in its *own name*, "in an appropriate court having jurisdiction." The section further empowers the legal representative of the Port Authority to "begin such action or proceeding" and does not restrict the Port Authority to suits *only* in the State of New York. The section states that the action "may be brought in the supreme court of this state" and thereby gives to the Port Authority the option of suing in the Federal Court. Not

only does this section provide further support to respondents' position that the Port Authority is not an agency of the States for Eleventh Amendment purposes, but it also creates a somewhat difficult position for the petitioner to claim, on the one hand, that the Port Authority cannot be sued in the Federal Courts, while on the other hand, this section allows the Port Authority to sue as a plaintiff in the Federal Courts.

As further support for the position of the respondents, that the Port Authority is not entitled to Eleventh Amendment immunity, is the fact that even the State of New York, in suing the Port Authority in *its own name*, considers the Port Authority an independent entity or municipal corporation. In *People v. Port of New York Authority*, 64 Misc. 2d 563, the Attorney General of the State of New York brought an action against the Port Authority claiming violations of the public health law. Certainly, the petitioner cannot be heard to argue that the State of New York would sue one of its own agencies. In *Lake Country Estates*, this Court pointed to litigation between the State of California and the TRPA as further proof of the fact that the TRPA was not an agency or arm of the State, and hence not entitled to Eleventh Amendment immunity (at 402). Likewise, since the Port Authority has described itself as "self-supporting", "pays its own way" as discussed above (see Comprehensive Annual Financial Report) it becomes clearer and clearer as the various statutes establishing and governing the Port Authority are reviewed, that the Port Authority is not an agency of arm of either the State of New York or New Jersey, that it functions independent of and exercises the powers of an independent entity such that it is not

entitled to the protections of the Eleventh Amendment immunity.

In *Lake Country Estates*, this Court rejected the over-expansive reading of the Eleventh Amendment that had been decided by the Ninth Circuit. This Court rejected the reasoning that Eleventh Amendment immunity should apply to every bi-state agency unless the immunity of that agency were expressly waived. This Court stated "we cannot accept such an expansive reading of the Eleventh Amendment. By its terms, the protection afforded by that Amendment is only available to 'one of the United States.' " If an examination of the compact that set up the Port Authority discloses that the Port Authority is comparable to a county or municipal corporation, then it has no Eleventh Amendment immunity. This is precisely what has been described above. The Port Authority exercises such diverse powers, controls and activities wholly independent of the control of the State that it cannot be considered an agency of the State and is more comparable to a county or municipal corporation. The Court has time and time again indicated that the control of local land areas has traditionally been the function of a county or municipality. As indicated by the discussion above, the Port Authority exercises such control over the operation, management, sale, purchase, issuance of bonds and the like of all facilities within the Port Authority district that it cannot be considered an agency, and operates more as a municipal corporate entity, which is precisely how it is described in the governing statutes (see, for example, § 6407) (Pet. App., A-52).

The determining factor in *Lake Country Estates*, was the insulation of the State Treasury from any judgments against the TRPA.

In order to determine whether or not the Port Authority is an agency of the State, this Court had traditionally looked to the real effect of a judgment being obtained against the agency. The real question thus becomes: is the State Treasury responsible for a judgment obtained against the Port Authority? Thus, where there was any doubt as to whether or not Eleventh Amendment immunity was applicable, this Court has focused upon whether or not the State Treasury is responsible for a judgment, in determining the issue (see, for example, *Edelman v. Jordan*, 415 U.S. 651; see also, *Ford Motor Company v. Department of Treasury of the State of Indiana*, 323 U.S. 459). In the case of the Port Authority, the State Treasury is not responsible for a judgment and therefore, while the Port Authority may be, from the petitioner's point of view, considered a political subdivision, it is nonetheless not an agency of the State and exercises such independence that it is not entitled to Eleventh Amendment immunity. Pursuant to § 6408 (N.Y. Unconsol. Laws McKinney 1979) (Pet. App., A-52), the Port Authority "shall not pledge the credit of either State."

As discussed earlier, bonds issued by the Port Authority are not obligations of the State (1930 report of Att'y Gen. 124). In addition, § 6459 (Pet. App., A-54) specifically provides that the Port Authority "shall have no power to pledge the credit of either State or to impose any obligation upon either State . . . except as and when such power is expressly granted by statute or the consent by any such municipality is given." It thus becomes clear

that the State Treasury is insulated from actions by or against the Port Authority. Finally, § 6416 (Pet. App., A-53) specifically limits the amount that the State shall appropriate, to $100,000.00, and further limits that appropriation to be used for salaries, office expenses and "other administrative expenses." The section further only requires this appropriation for office expenses and salaries until such time as the revenues from the operations of the Port Authority are adequate to meet its own expenditures. Not only is this appropriation an "optional obligation" as described by the Court below (Pet. App., A-15), as the Second Circuit went on to state, this optional obligation was limited to a "very narrow category of expenses" and thus the State Treasury was insulated not only from the "bulk" of the petitioner's operating expenses but also from personal injury judgments. There is nothing contained in the statutes cited by the petitioner which supports the argument that the State Treasury is exposed to a personal injury judgment. In fact, the legislation is so carefully drawn that the State Treasury is specifically insulated.

From the foregoing, it is submitted that it is clear that the Port Authority is an independent, self-sufficient entity that has vast powers reserved to itself, which is empowered to buy, sell, lease land, to issue bonds, to borrow money, perform a whole host of other functions and exercises such control over its own operations that it cannot be considered an agency of the State as far as Eleventh Amendment immunity is concerned.

POINT II

THE IMMUNITY AFFORDED BY THE ELEVENTH AMENDMENT HAS BEEN WAIVED BY OR ON BEHALF OF THE PORT AUTHORITY TRANS-HUDSON CORPORATION

Pursuant to § 7101 (N.Y. Unconsol. Laws McKinney 1979) (Pet. App., A-54), the States of New York and New Jersey consent to suits "of any form or nature at law, in equity or otherwise" against the Port Authority. Further, pursuant to § 7106 (N.Y. Unconsol. Laws McKinney 1979) (Pet. App., A-54) the foregoing consent is conditioned upon such a suit against the Port Authority being brought "within a county or a judicial district, established by one of said states *or by the United States*." (emphasis added) The only requirement of § 7106 is that the action be brought within the Port of New York District.

The personal injury actions instituted by both respondents were commenced in the Southern District of New York, a District Court established by the United States, and located within the Port of New York District. Nonetheless, the petitioner argues that the term "United States" does not mean a District Court such as the Southern District of New York. Pursuant to § 7106, the Port Authority is deemed to be a resident of the Judicial District encompassed by the Southern District. Petitioner argues that the term "United States" in § 7106 does not mean what it appears to mean, without telling us why.

One of the pitfalls of unrestrained legal argument is loss of perspective. One can become so enmeshed in legal argument that the plain meaning of the English word becomes clouded. As this Court stated in *United States v.*

James, 478 U.S. 597: "[T]he starting point in statutory interpretation is 'the language [of the statute] itself.' (citations omitted) [W]e assume that the legislative purpose is expressed by the ordinary meaning of the word used." (at 604) This Court went on to state that when the language of a statute becomes unambiguous, "judicial inquiry is complete", except in rare instances (at 606). In *AMOCO Production Co. v. Gambell*, 480 U.S. 531, this Court stated that when the statutory language is plain, going behind such plain language is a step that should be taken " 'cautiously even under the best of circumstances.' " (at 553).

Black's Law Dictionary (West Publishing Co. 1968) defines "Federal Courts" as "the courts of the United States" (at p. 740). The term "Courts of the United States" is further defined to include the "District Courts" (at p. 435). *Webster's New Collegiate Dictionary* (G & C Merriam Co. 1979) defines "Federal District Court" as "a district trial court of law and equity that hears cases under federal jurisdiction". The term "Federal Court" is defined as: "a court established by authority of a federal government; esp: one established under the constitution and laws of the U.S." (at 416). It is submitted that the plain meaning of the term "United States" found in § 7106 means the District Courts, including the Southern District of New York, which lie within the Port Authority District. And § 7101 does not restrict cases against the Port Authority to specific categories. In fact, that section specifically states that suits "of *any* form or nature at law" are authorized (emphasis supplied). It flies in the fact of

good sense and ereason to contend, that the plain language of Sections 7101 and 7106 do not permit suits to be brought against the Port Authority in the Federal Court.

In *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468 (1987), the Court stated that a State may waive its immunity and consent to suit in Federal Court, provided such waiver is indicated by express language. However, the question of express waiver was not before the Court in that case, and accordingly, the Court had no occasion to rule upon it. The Court, however, did state that if a State "waives its immunity and consents to suit in federal court, the suit is not barred by the Eleventh Amendment." (citation omitted) (at 473). In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, the Court stated that the waiver by a State of it immunity is a well-established exception to the protections afforded by the Eleventh Amendment. Under such circumstances, an action against the State is not barred by the Eleventh Amendment. The Court went on to require that such a waiver be by "the most express language." (at 240) Where, as here, the State waives its immunity and indicates a "willingness to be sued in federal court" (at 241) the waiver will be sustained and the protection of the Eleventh Amendment will not be applicable. Section 7106 clearly specifies that the Port Authority can be sued in the Federal Court when the language "established by one of said states or by the United States, and situated wholly or partially within the Port of New York District" is used. Clearly, the language of § 7101 and § 7106 meet the requirements of this Court as stated in *Welch* and *Atascadero;* the waiver is clear, unambiguous, contained in

express language, and leaves no room for any other logical explanation. Certainly, there can be no other "reasonable construction" to be applied to the clear import of these sections. The Port Authority consents to suits of any kind or nature, as long as they are brought in either the State or Federal Court that lies within the Port Authority District. The actions brought by the respondents in the Southern District of New York clearly meet the requirement of Sections 7101 and 7106 and accordingly, the decision of the Second Circuit should be affirmed.

CONCLUSION

The orders of the Court of Appeals for the Second Circuit should be affirmed.

DATED: ISLIP, NEW YORK
January 15, 1990

Respectfully submitted,

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§ 6406. Board of commissioners; by-laws

ARTICLE V

The commissioners shall, for the purpose of doing business, constitute a board and may adopt suitable by-laws for its management.

§ 6459. Powers of port authority and municipalities in executing plan; securities tax exempt; limitations

The port of New York authority[1] is hereby authorized and directed to proceed with the development of the port of New York in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state, to effectuate the same, except the power to levy taxes or assessments. It shall request the congress of the United States to make such appropriations for deepening and widening channels and to make such grants of power as will enable the said plan to be effectuated. It shall have power to apply to all federal agencies, including the interstate commerce commission, the war department, and the United States shipping board, for suitable assistance in carrying out said plan. It shall cooperate with the state highway commissioners of each state so that trunk line highways as and when laid out by each state shall fit in with said comprehensive plan. It shall render such advice, suggestion and assistance to all

[1] Now the Port Authority of New York and New Jersey. See section 6404.

municipal officials as will permit all local and municipal port and harbor improvements, so far as practicable, to fit in with said plan. All municipalities within the district are hereby authorized and empowered to cooperate in the effectuation of said plan, and are hereby vested with such powers as may be appropriate or necessary so to cooperate. The bonds or other securities issued by the port authority shall at all times be free from taxation by either state. The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, but it shall have no power to pledge the credit of either state or to impose any obligation upon either state, or upon any municipality, except as and when such power is expressly granted by statute, or the consent by any such municipality is given.

§ 6466. Actions to enforce laws and orders; jurisdiction of courts

Whenever the port authority shall be of the opinion that any person, association or corporation subject to its jurisdiction is failing or omitting, or about to fail or omit to do anything required of it by the laws governing the development and regulation of the port of New York, or by its order, or is doing or is about to do anything, or permitting, or about to permit anything to be done contrary to, or in violation of, such law or orders, it shall direct its legal representative to commence an action or proceeding in the name of the port authority, in an appropriate court having jurisdiction, for the purpose of having such violations, or threatened violations, stopped and prevented either by mandamus or injunction. Such an

action or proceeding may be brought in the supreme court of this state, and the said court shall have and is hereby given the necessary and appropriate jurisdiction to grant mandamus or injunction, as the case may require, or any other relief appropriate to the case.

Failure of such person, association or corporation to notify the port authority, as required in the preceding section, of its acceptance of and willingness to obey any order of the port authority shall be and be deemed to be prima facie proof that such person, association or corporation is guilty of such violation, or threatened violation. The legal representative of the port authority shall begin such action or proceeding by a petition to the appropriate court, alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. If the petition is directed to a court of this state, it shall thereupon be the duty of the court to specify the time, not exceeding twenty days after the service of a copy of the petition, within which the person, association or corporation complained of must answer the petition. In case of default in answer, or after answer, the court shall immediately inquire into the facts and circumstances, in such manner as the court shall direct, without other or formal pleadings and without respect to any technical requirement. Such other persons, associations or corporations as the court shall deem necessary or proper to join as parties, in order to make its order, judgment or writs effective, may be joined as parties upon application of the legal representative of the port authority. The final judgment in any such action or proceeding shall either dismiss the action or proceeding, or direct that a writ of mandamus, or an injunction, or both, issue as prayed for

in the petition, or in such modified or other form as the court may determine will afford the appropriate relief.

§ 6612. General powers; local laws; subsidiary corporation

All details of the effectuation, including but not limited to details of financing, leasing, rentals, tolls, fares, fees and other charges, rates, contracts and service, of the world trade center, the Hudson tubes and the Hudson tubes extensions by the port authority shall be within its sole discretion and its decision in connection with any and all matters concerning the world trade center, the Hudson tubes and the Hudson tubes extensions shall be controlling and conclusive. The local laws, resolutions, ordinances, rules and regulations of the city of New York shall apply to such world trade center if so provided in any agreement between the port authority and the city and to the extent provided in any such agreement.

So long as any facility constituting a portion of the port development project shall be owned, controlled or operated by the port authority (either directly or through a subsidiary corporation incorporated for any of the purposes of this act[1]), no agency, commission or municipality of either or both of the two states shall have jurisdiction over such facility nor shall any such agency, commission or municipality have any jurisdiction over the terms or method of effectuation of all or any portion thereof by the port authority (or such subsidiary corporation) including but not limit to the transfer of all or any portion thereof

[1] Sections 6601 to 6618.

to or by the port authority (or such subsidiary corporation).

Nothing in this act shall be deemed to prevent the port authority from establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project through wholly owned subsidiary corporations of the port authority or from transferring to or from any such corporations any moneys, real property or other property for any of the purposes of this act. If the port authority shall determine from time to time to form such a subsidiary corporation it shall do so by executing and filing with the secretary of state of New York and the secretary of state of New Jersey a certificate of incorporation, which may be amended from time to time by similar filing, which shall set forth the name of such subsidiary corporation, its duration, the location of its principal office, and the purposes of the incorporation which shall be one or more of the purposes of establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project. The directors of such subsidiary corporation shall be the same persons holding the offices of commissioners of the port authority. Such subsidiary corporation shall have all the powers vested in the port authority itself for the purposes of this act except that it shall not have the power to contract indebtedness. Such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions

and activities. Such subsidiary corporation shall be subject to the restrictions and limitations to which the port authority may be subject, including, but not limited to the requirement that no action taken at any meeting of the board of directors of such subsidiary corporation shall have force or effect until the governors of the two states shall have an opportunity, in the same manner and within the same time as now or hereafter provided by law for approval or veto of actions taken at any meeting of the port authority itself, to approve or veto such action. Such subsidiary corporation shall be subject to suit in accordance with section nine of this act[2] and chapter three hundred one of the laws of New York of nineteen hundred fifty[3] and chapter two hundred four of the laws of New Jersey of nineteen hundred fifty-one[4] as if such subsidiary corporation were the port authority itself. Such subsidiary corporation shall not be a participating employer under the New York retirement and social security law or any similar law of either state and the employees of any such subsidiary corporation, except those who are also employees of the port authority, shall not be deemed employees of the port authority.

Whenever any state, municipality, commission, agency, officer, department, board or division is authorized and empowered for any of the purposes of this act to co-operate and enter into agreements with the port authority or to grant any consent to the port authority or to grant, convey, lease or otherwise transfer any property

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[2] Section 6609.

[3] Section 7101 et seq.

[4] N.J.S.A. 32:1-157 et seq.

to the port authority or to execute any document, such state, municipality, commission, agency, officer, department, board or division shall have the same authorization and power for any of such purposes to co-operate and enter into agreements with such subsidiary corporation and to grant consents to such subsidiary corporation and to grant, convey, lease or otherwise transfer property to such subsidiary corporation and to execute documents for such subsidiary corporation.

§ 6951. Sale of real property, manner of procedure

Whenever The Port of New York Authority[1] (hereinafter called the Port Authority) shall determine to sell any real property which may have been acquired by the Port Authority by purchase, condemnation or otherwise, pursuant to any of its powers and authorities, but which real property is no longer required for such purposes, the following procedure shall be followed:

(a) A map shall be made of such real property so determined as no longer required, which map shall be filed in the office of the Port Authority.

(b) There shall be annexed to such map a certificate executed by the chief engineer of the Port Authority stating that such real property is no longer required for such purposes.

(c) All or any portion of said real property may be sold at either private or public sale, and all deeds of

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[1] Now the Port Authority of New York and New Jersey. See section 6404.

conveyance therefor shall be by bargain and sale and shall be executed by the chairman, or the vice chairman, or the general manager, or an assistant general manager of the Port Authority and attested by the secretary thereof.

§ 7031. Negotiability of instruments unaffected by certain provisions

Upon the concurrence of the state of New Jersey herein, in the manner indicated in section two hereof,[1] the states of New York and New Jersey agree that any bond, note or instrument heretofore or hereafter issued by the port of New York authority[2] containing a provision that upon the happening of a specified event or events it shall be exchanged for or converted into a general and refunding bond, consolidated bond or note or other negotiable bond, note or instrument of the port of New York authority shall, notwithstanding such provision, be and be deemed to be also a negotiable instrument under the law of each state, provided, that it conforms in all other respects to the requirements for negotiable instruments under the law of such state.

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[1] Section 7032.

[2] Now the Port Authority of New York and New Jersey. See section 6404.

§ 7053. Bonds as direct obligation of authority; security for payment; terms and conditions; redemption

The bonds delivered to the two states pursuant to this act[1] and the concurrent act of the state of New Jersey[2] shall be direct and general obligations of the port authority, and its full faith and credit shall be pledged for the prompt payment of the principal and interest thereof. The payment of the principal and interest thereof shall be secured by the general reserve fund of the port authority, authorized by chapter forty-eight of the laws of New York of nineteen hundred and thirty-one[3] and chapter five of the laws of New Jersey of nineteen hundred and thirty-one;[4] and said general reserve fund shall be pledged as security for the payment of the principal and interest of said bonds and for the fulfillment of other undertakings assumed by the port authority to or for the benefit of the holders of said bonds. Such pledge, however, shall be subject to the right of the port authority to pledge said general reserve fund as security for any other bonds, notes or evidences of indebtedness whatsoever hereafter issued by the authority as security for which it may at the time be authorized to pledge the said general reserve fund, and also subject to the right of the port authority to use the moneys in said general reserve fund to meet, pay or otherwise fulfill any of its obligations under or in connection with any bonds, notes or other evidences of indebtedness as security for which said

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[1] Sections 7051 to 7058.

[2] N.J.S.A. 32:1-140.1 to 32:1-140.7.

[3] Section 7001 et seq.

[4] N.J.S.A. 32:1-141 et seq.

general reserve fund has heretofore been or is now pledge or for which said general reserve fund may hereafter be pledged. Moreover, no greater rights in or to said general reserve fund shall be granted to or conferred upon the holders of the bonds delivered to the two states pursuant to this act and the concurrent act of the state of New Jersey than have been granted to and conferred upon the holders of general and refunding bonds of the port authority issued pursuant to the resolution of the port authority adopted March eighteenth, nineteen hundred and thirty-five, and amended March twenty-fifth, nineteen hundred and thirty-five and September sixteenth, nine-teen hundred and forty-three.

The bonds delivered to the two states pursuant to this act and the concurrent act of the state of New Jersey shall be dated as of a date not more than thirty days subsequent to the date on which delivery is made or tendered, shall mature forty years from their date, and shall bear interest at the rate of one and one-half per centum per annum. Said bonds shall be subject to redemption at the option of the port authority, in whole or in part, on any interest payment date or dates at one hundred percent of their par value, plus accrued interest to the date set for redemption.

Except as hereinbefore specifically provided, the port authority shall, by resolution, determine the form, characteristics and all other matters in connection with said bonds, including without limiting the generality hereof, the denominations in which they shall be issued, provisions with respect to the exchange of bonds of one denomination into bonds of another denomination, provisions with respect to the issuance of temporary bonds

and the exchange thereof for definitive bonds, provisions with respect to the establishment of a sinking fund or sinking funds and for the use of the moneys in sinking fund to purchase or redeem bonds prior to their maturity, provisions with respect to the place of payment, provisions with respect to notice of redemption, provisions with respect to the paying agent or the registrar and provisions with respect to the method of signature.

Supreme Court, U.S.
FILED
FEB 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Petitioner,

– against –

PATRICK FEENEY,
Respondent.

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Petitioner,

– against –

CHARLES T. FOSTER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER PORT AUTHORITY TRANS-HUDSON CORPORATION

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REPLY BRIEF ON BEHALF OF PETITIONER PORT AUTHORITY TRANS-HUDSON CORPORATION

In this reply brief, petitioner Port Authority Trans-Hudson Corporation responds to the arguments set forth in the briefs submitted by respondents and opposing *amici*.

I.

THE PORT AUTHORITY'S RELATIONSHIP TO THE COMPACTING STATES.

In *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979), this Court stated that "[i]f an interstate compact discloses that the compacting States created an agency comparable to a county or municipality," there is no Eleventh Amendment immunity. But if, on the other hand, "[t]he intentions of [the compacting States], the terms of the Compact and the actual operation" of the entity disclose that the States had created an agency clothed with their powers and protections, the result is otherwise. *Id.* at 402.

In light of the close affinity between the Port Authority and its compacting States described in our principal brief which demonstrates that the Port Authority is entitled to share the States' Eleventh Amendment immunity,[1] what do respondents and opposing *amici* have to say in answer? In essence, they make seven separate contentions, none of which has merit:

1. Respondents point to the sole *Lake Country Estate* factor which it is arguable that the Port Authority does

[1] We there showed that this agency was established as an arm of State government and is politically and legally accountable as such to the Legislatures and Governors of both States. It can in no way be equated with a county, municipality or any other similar unit of local government whose governing officials are accountable to their particular local electorates. Hence, it is not surprising, that prior to the passage of its 1950-51 suability statute, every state and federal court that considered the matter held, without exception, that the Port Authority shared the common law sovereign immunity from suit of its compacting States. It would, therefore, appear rather startling to hold that it did not also share the States' Eleventh Amendment immunity from suit in federal courts.

not meet – that a money judgment against it is payable out of its funds and not out of general State tax revenues. While this is technically true, our principal brief pointed out that the "State treasury" factor was never meant by itself to be determinative, and carries even less weight when, as here, all the other indicia of State agency status set forth in *Lake Country Estates* point in but one direction – that the States plainly intended their Port Authority to function as their direct agent in the matters assigned to it. Furthermore, an over technical interpretation of this factor results in an artificial way of viewing the Port Authority's close financial relationship with its compacting States. Indeed, the New Jersey Supreme Court looking at this relationship in realistic pragmatic terms indicated that there can be multiple "State treasuries" when it said:

> ". . . the general taxpayer too has an interest in such agencies [as the Port Authority]. First, he might be asked to provide the facilities if the State could not supply them through the agency. In fact the Holland Tunnel [which the Port Authority has operated since 1930] was built with the funds of the States. Next, these agencies may also furnish facilities that are not self-supporting and hence would burden the general taxpayer if furnished directly by the State. This, we gather, is true of the Port Authority. Further, it may be doubted as a practical matter that government would walk away from an agency which founders; financial failure would prejudice the acceptance of the bonds of other agencies of the same sovereign. And finally, the net assets of these agencies belong to the States that created them, and the taxpayers and citizens will profit from the use to which they are put after the bonds are liquidated." *Port of N.Y. Authority v.*

Hackensack Water Co., 41 N.J. 90, 106, 107; 195 A.2d 1, 17, 18 (1963).[2]

Thus, we submit that in a practical down-to-earth sense a judgment against the Port Authority ultimately has the same effect as one against the compacting States themselves and, therefore, the Port Authority meets this *Lake Country Estates* criterion as well. In this connection, we note that respondents stress the fact (Br.7) that the Port Authority, pursuant to statute, places its surplus revenues in a general reserve fund which it pledges as security for its obligations. They fail to mention, however, the further provision in the Authority's General Reserve Fund Act that:

> "Any surplus revenues not required for the establishment and maintenance of the aforesaid general reserve fund shall be used for such purposes as may hereafter be directed by the two said states." N.Y. Unconsol. L. §7002 (McKinney 1979); N.J.S.A. 32:1-142 (West 1963).

2. Respondents argue that the Port Authority should not share the States' Eleventh Amendment immunity citing as support for their position (Br. 8) the provision in the

[2] Although the Port Authority has liquidated many of its prior series of bonds, at the present time it has over $3.5 billion in outstanding obligations. This is because, over the years, existing Authority facilities had to be modernized and expanded, and the States have periodically assigned new powers and duties to this agency. As our principal brief pointed out (Br. 25-26), the Authority continues to provide the States with important new facilities, including non-revenue producing projects relating to economic development and infrastructure renewal and, of course, this agency continues to operate, on behalf of the States, deficit facilities such as PATH.

Authority's Hudson Tubes-World Trade Center legislation which provides that all details of operating these facilities shall be within the Authority's sole discretion and its decision concerning such matters shall be controlling and conclusive; and further that no agency, commission or municipality of either State shall have jurisdiction over such facilities. N.Y. Unconsol. L. §6612; N.J.S.A. 32:1-35.61. Similar provisions can be found in other Port Authority legislation as well.[3]

We submit that these provisions, far from supporting the proposition that the Port Authority should not be accorded the States' Eleventh Amendment immunity, prove just the opposite. They – together with the statute's declaration that the effectuation of these projects by the Port Authority will be for the benefit of the people of the two States and that the Authority, in carrying out its responsibilities concerning these projects, shall be regarded as performing an essential governmental function[4] – reflect the clear bi-State legislative policy that, in developing and operating its facilities, the Port Authority stands in the shoes of the compacting States themselves. In fact, it is

[3] *See, e.g.*, Bridge and Tunnel Unification Act, N.Y. Unconsol. L. §§6502, 6512; N.J.S.A. 32:1-119, 32:1-128; Air Terminal Act, N.Y. Unconsol. L. §§6631, 6634; N.J.S.A. 32:1-35.1, 32:1-35.4; Bus Project Act, N.Y. Unconsol. L. §7201; N.J.S.A. 32:2-23.27; Industrial Development Project Act, N.Y. Unconsol. L. §7180; N.J.S.A. 32:1-35.59.

[4] The Port Authority's Hudson Tubes – World Trade Center legislation provides that the effectuation of these projects:

> "... are and will be in all respects for the benefit of the people of the states of New York and New Jersey, for the

(Footnote continued)

precisely because the Port Authority functions as the proxy or *alter ego* of the States that the Legislatures provided that no other agency of either State can review its determinations – determinations which, we emphasize, are always subject to gubernatorial veto.[5]

3. Respondents, citing *People v. Port of New York Authority*, 64 Misc.2d 563; 315 N.Y.S.2d 9 (Sup.Ct. N.Y.Co. 1970), mistakenly assert (Br. 9) that inasmuch as the New York Attorney General has sought injunctive relief against this agency, "even the State of New York . . . considers the Port Authority an independent entity or municipal corporation." The point that respondents miss is that when the States enacted the Authority's suability statute, their "declared policy" was "not to waive the Port Authority's immunity from injunctive suit by private individuals." *Lewis v. Lefkowitz*, 32 Misc.2d 434, 436, 437; 223 N.Y.S.2d 221, 223 (Sup.Ct. N.Y.Co. 1961), aff'd 17 A.D. 2d 778 (1st Dept. 1962). Rather, under the statute, "[t]his right is given only to the Attorney General who may, in his discretion, bring such suit on behalf of any individual." 32 Misc.2d at 436, 323 N.Y.S.2d at 222.

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increase of their commerce and prosperity and for the improvement of their health and living conditions; and the port authority and any subsidiary corporation incorporated for any of the purposes of this act shall be regarded as performing an essential governmental function in undertaking the effectuation thereof, and in carrying out the provisions of law relating thereto." N.Y. Unconsol. L. §6610; N.J.S.A. 32:1-35.59

[5] The only exception is with respect to the power of the New Jersey Governor to veto the minutes relating to fixing of tolls for Port Authority bridges. N.J.S.A. 32:2-9

In commenting on this statutory provision, the New Jersey Supreme Court has said:

> "Presumably, in enacting these identical statutes, both legislatures feared the immobilization of important public projects of the Port Authority and the attendant diversion of resources which might result from suits for injunctive relief. They sought to ensure, through these statutes, that only those suits first screened by a responsible public official might be brought." *Evans-Aristocrat Industries, Inc. v. Newark and The Port Authority of New York & New Jersey*, 75 N.J. 84, 90; 380 A.2d 268, 274 (1977).

Other cases which have commented on the Attorney General's statutory authorization to seek injunctive relief include *Wolkstein v. Port of New York Authority*, 178 F.Supp. 209, 213 (D.N.J. 1959) and *New York City Chapter of National Electrical Contractors Ass'n v. Fabber, et al.*, 73 Misc.2d 859, 861; 343 N.Y.S.2d 33, 35 (Sup.Ct. N.Y.Co. 1973) where the court said:

> "It may be noted that pursuant to the compact and subsequent legislation, the Port Authority *on behalf of the 2 member states* owns or operates some 24 public terminal, transportation and other facilities within the port district, including 6 marine terminals." (Emphasis added).

Consequently, a litigant's inability to obtain injunctive relief against the Port Authority without the Attorney General's presence, is proof, not lack of proof, that this agency partakes of the States' sovereign immunity from suit.

4. It is hard to take seriously respondents' assertion that (Br. 6) "[n]either the State of New York nor New Jersey issue [sic] any laws, rules or regulations regarding the operation of the Port Authority or any of its facilities." The fact is that over the years both States have each enacted 47 separate concurrent statutes specifically dealing with the Port Authority and, in addition, each State has passed various non-concurrently enacted statutes and resolutions relating to this agency. (See Appendix A for a chronological list of these statutes and resolutions.)[6] New Jersey has passed 17 non-concurrent statutes and 12 resolutions, while New York has adopted 34 non-concurrent statutes and 3 resolutions as well as a constitutional amendment enabling the Port Authority to provide New York residents with commuter railroad cars, N.Y. Const. Art. X, § 7. And insofar

[6] We note that if the Port Authority were to be classified as a municipality, and not as a direct State agency, all of these statutes would apparently violate the New York Constitution since none were adopted in accordance with its home rule provisions. As the New York Court of Appeals stated:

> "It is apparent that in drafting this legislation the Port Authority was always regarded as involved in matters of State concern, and consequently not subject to the Home Rule amendment. If it were to be brought within that amendment, the Port Authority Acts would have been invalid from the beginning inasmuch as they never complied with the constitutional requirements prescribed in the case of the enactment of statutes dealing with the 'property, affairs or government' of cities." *Whalen* v. *Wagner*, 4 N.Y. 2d 575, 581 (1958).

In upholding the challenged legislation, the court relied upon many previous Port Authority decisions, pointing out:

> "The Port Authority is and of necessity has to be a State agency, in view of its dual State character and functions." *Id.* at 584.

as the operation of Port Authority facilities is concerned, the two Legislatures have specifically enacted, in *haec verba*, the rules and regulations which the Port Authority's Board of Commissioners had previously adopted governing the movement of traffic on its vehicular crossings, N.Y. Unconsol. L. §6801; N.J.S.A. 32:1-154.1 (Appendix B-1 to B-7), and on its air and marine terminal highways, N.Y. Unconsol. L. §6831; N.J.S.A. 32:1-154.18 (Appendix B-7 to B-13). In addition, the two Legislatures have enacted, also in *haec verba*, the Authority's rules and regulations governing smoking at its air and marine terminals, N.Y. Unconsol. L. §§6851, 6852; N.J.S.A. 32:1-146.4, 32:1-146.5 (Appendix B-13 to B-14), and governing the operation of PATH, N.Y. Unconsol. L. §§6861, 6862; N.J.S.A. 32:1-146.8; 32:1-146.9 (Appendix B-14 to B-17).

5. *Amici* Pan American, *et al.*, try to equate the Port Authority with a municipal corporation, a corporation which possesses no Eleventh Amendment immunity, by referring (Br. 7) to one of the statutory designations for this agency, that of a "municipal corporate instrumentality." Our principal brief conclusively refutes this contention by quoting (Br. 15-16) from the U.S. District Court's answer to an identical argument that was made in *Howell v. Port Authority*, 34 F.Supp. 497 (D.N.J. 1940). In this context, it is instructive to note that when this Court ruled in *Lincoln County* v. *Luning*, 133 U.S. 529, 530 (1890), that neither counties, nor municipalities, possess Eleventh Amendment immunity, it pointed out that such political subdivisions are a "part of the State only in [a] *remote sense* . . . ." (Emphasis added)

But, the Port Authority, we have shown, is not a part of its compacting States in any "remote sense." Rather, it

is inextricably intertwined with the Executive and Legislative Departments of the two States. Its Commissioners are both politically and legally accountable to their Governors, who possess a veto power over all their actions,[7] and the Authority, as a creature of the State Legislatures, is subject, in all respects, to legislative control and direction. Indeed, every action the Port Authority takes implicates the compacting States *qua* States. This is certainly not true of counties and municipalities whose governing boards, as previously noted, are directly accountable to their local electorates, not to State officials.

6. *Amici* Pan American, *et al.*, chide the Port Authority for having participated in federal court litigation for over four decades without having raised the Eleventh Amendment as a defense. What *amici* ignore is the evolution of Eleventh Amendment doctrine during this period. Certainly, in the era of *Parden v. Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184 (1964), it would have hardly appeared responsible for an entity like the Port Authority which, by definition, is concerned almost wholly with matters of interstate and foreign commerce, many of which are regulated by Congress, to have raised the Eleventh Amendment as a defense. Indeed, it was not until *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468 (1987), that the *Parden* era had definitely ended. In any event, a basic jurisdictional defect like the absence of Eleventh Amendment jurisdiction can never be waived by defending suits on their merits. As this Court stated in *Ford Motor Co. v. Dept. of Treasury of the State of Indiana*, 323 U.S. 459, 467 (1945):

[7] See footnote 5.

> "The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however."

7. *Amici* Pan American, *et al.*, also allege that the Port Authority's (Br. 8) "newly adopted strategy of asserting Eleventh Amendment immunity appears to be exercised most selectively." They assert that after vigorously arguing to the Second Circuit in this case that it possessed Eleventh Amendment immunity, the Port Authority urged the same court in *Automobile Club of New York v. Port Authority*, 887 F.2d 417 (2d Cir. 1989), to affirm a decision favorable to it on the merits, apparently without raising any claim of immunity. *Amici* are wrong. In footnote 2 of *Automobile Club*, the Second Circuit said:

> "We should note also that the Port Authority's affirmative defense based upon the Eleventh Amendment, *see id.* at 271-72, is now foreclosed by our decision in *Feeney v. Port Auth. Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir.1989)." 887 F.2d 417, 420.

In sum, none of respondents' or opposing *amicis'* arguments casts a shred of doubt on the well established status of the Port Authority as a State, albeit bi-State, agency. In *Lake Country Estates*, this Court indicated that in view of the Eleventh Amendment's deference to State sovereignty, the determinative issue in deciding the status of a compact agency should be the intention of the compacting States and Congress' consent to that intention. Here, we respectfully submit, that by virtue of the 1921 Congressionally consented-to Port Compact establishing this agency, the many subsequently enacted statutes,

amending and supplementing the Compact, and the numerous court decisions interpreting the Compact and the subsequently enacted legislation – all of which demonstrate a close and intimate relationship between the Port Authority and its parent States, there can be no question but that this agency should share the Eleventh Amendment immunity of its creators. Such a holding, we believe, will fortify "'[t]he principles of federalism that inform Eleventh Amendment doctrine,'"[8] by encouraging the States to solve cooperatively their particular regional problems by creating compact agencies clothed with their protections and privileges through utilization of the Constitution's Compact Clause, just as New York and New Jersey have been successfully solving their regional problems for almost 70 years through their Port Authority.

[8] *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984), *citing*, *Hutto v. Finney*, 437 U.S. 678 (1978).

II.

THE ISSUE OF WAIVER

Finally, little more need be said concerning the claimed waiver of Eleventh Amendment immunity based on the venue provision in the Port Authority's suability statute.[9] Obviously it is not an unambiguous waiver of immunity. If it were, the Second and Third Circuits would not have reached opposite conclusions as to its meaning and the many pages devoted to it in the briefs of the parties and the *amici* would have been unnecessary. Hence, under these circumstances, the question is where does the presumption lie. If the rule laid down by this Court is that uncertainty should be resolved in favor of waiver, federal court jurisdiction over this controversy might exist. But if this Court's rule is the opposite, as it unquestionably is, then the debate ends and Eleventh Amendment immunity bars this suit.

[9] The consent-to-suit provision of the statute – the provision that confers judicial jurisdiction over actions brought against the Port Authority – is found in Section 1 of the act. N.Y. Unconsol. L. §7101; N.J.S.A. 32:1-157 (Pet. at A-54). And this section cannot, under the settled law of this Court, be interpreted to constitute a waiver of Eleventh Amendment immunity. Respondents and opposing *amici* claim, however, that such consent can be found in the venue provision of section 6 of the statute. N.Y. Unconsol. L. §7106; N.J.S.A. 32:1-162 (Pet. at A-54-55). But, as this Court has ruled: "[v]enue provisions come into play only *after* jurisdiction has been established and concern 'the place where judicial authority may be exercised'". *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 793 n.30 (1985) (emphasis added), *quoting*, *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939).

CONCLUSION

The Orders of the Court of Appeals should be reversed and the Complaints Dismissed for Lack of Subject Matter Jurisdiction.

Dated: New York, New York
February 14, 1990

Respectfully submitted,

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APPENDIX

APPENDIX A

PORT COMPACT OF 1921 AND LEGISLATION CONSTITUTING AGREEMENTS BETWEEN THE STATES AMENDATORY AND SUPPLEMENTAL TO THE PORT COMPACT OF 1921

		N.Y. Unconsol. Laws or N.J.S.A.*
Compact Authorization Act (New York)	C. 154, Laws of N. Y. 1921 (April 2, 1921)	6401-6423
Compact Authorization Act (New Jersey)	C. 151, Laws of N.J. 1921 (April 30, 1921)	32:1-1 to 24
Comprehensive Plan Act (New Jersey)	C. 9, Laws of N. J. 1922 (Feb. 23, 1922)	32:1-25 to 35
Comprehensive Plan Act (New York)	C. 43, Laws of N. Y. 1922 (Feb. 24, 1922),	6451-6468
	as amended by C. 623, Laws of N. Y. 1924 (May 5, 1924)	6462-6468

*Unless indicated otherwise, citations in this column are to the unofficial New York and New Jersey codifications of these provisions. The provisions for which no codification is supplied are not now codified.

Outerbridge Crossing: Construction (New Jersey)	C. 125, Laws of N. J. 1924 (March 11, 1924), as partially repealed by C. 192, Laws of N. J. 1925 (March 18, 1925)	32:1-36 to 46
Outerbridge Crossing: Construction (New York)	C. 230, Laws of N. Y. 1924 (April 23, 1924)	–
Goethals Bridge: Construction (New Jersey)	C. 149, Laws of N. J. 1924 (March 11, 1924) as partially repealed by C. 194, Laws of N.J. 1925 (March 18, 1925)	32:1-48 to 58
Goethals Bridge: Construction (New York)	C. 186, Laws of N. Y. 1924 (April 18, 1924)	–
Outerbridge Crossing: Condemnation (New Jersey)	C. 193, Laws of N. J. 1925 (March 18, 1925)	32:1 to 47

Goethals Bridge: Condemnation (New Jersey)	C. 195, Laws of N. J. 1925 (March 18, 1925)	32:1-59
Arthur Kill Bridges: Financing (New Jersey)	C. 37, Laws of N. J. 1925 (March 6, 1925)	32:1-60 to 70
Arthur Kill Bridges: Financing (New York)	C. 210, Laws of N. Y. 1925 (April 1, 1925)	–
George Washington Bridge: Construction (New Jersey)	C. 41, Laws of N. J. 1925 (March 9, 1925)	32:1-71 to 83.1
George Washington Bridge: Construction (New York)	C. 211, Laws of N. Y. 1925 (April 1, 1925)	–
Bayonne Bridge: Construction (New Jersey)	C. 97, Laws of N. J. 1925 (March 13, 1925)	32:1-94 to 106
Bayonne Bridge: Construction (New York)	C. 279, Laws of N. Y. 1926 (April 7, 1926)	–

George Washington Bridge: Financing (New Jersey)	C. 6, Laws of N. J. 1926 (March 10, 1926)	32:1-84 to 93.1
George Washington Bridge: Financing (New York)	C. 761, Laws of N. Y. 1926 (May 4, 1926)	–
Bayonne Bridge: Financing (New Jersey)	C. 3, Laws of N. J. 1927 (Feb. 15, 1927)	32:1-107 to 117
Bayonne Bridge: Financing (New York)	C. 300, Laws of N. Y. 1927 (March 24, 1927) as amended by C. 364, Laws of N. Y. 1928 (March 15, 1928) and C. 119, Laws of N.Y. 1929 (March 16, 1929)	–

Account Examination (New York)	C. 648, Laws of N. Y. 1929 (April 15, 1929)*	7071-7073
Holland Tunnel: Transfer to Port Authority as Agent (New York)	C. 421, Laws of N. Y. 1930 (April 12, 1930)	–
Holland Tunnel: Transfer to Port Authority as Agent (New Jersey)	C. 247, Laws of N. J. 1930 (April 21, 1930)	32:1-119, 122-125
Lincoln Tunnel Study (New York)	C. 420, Laws of N. Y. 1930 (April 12, 1930)	
Lincoln Tunnel Study (New Jersey)	C. 248, Laws of N. J. 1930 (April 21, 1930)	32:1-119.2
Bridge and Tunnel Unification (New Jersey)	C. 4, Laws of N. J. 1931 (March 2, 1931)	32:1-121

* The comparable New Jersey statute was enacted in C. 90, Laws of N. J. 1950 (May 1, 1950).

Bridge and Tunnel Unification (New York)	C. 47, Laws of N. Y. 1931 (March 4, 1931)	6501-6525
General Reserve Fund (New Jersey)	C. 5, Laws of N. J. 1931 (March 2, 1931)	–
General Reserve Fund (New York)	C. 48, Laws of N. Y. 1931 (March 4, 1931)	–
Payments in Lieu of Taxes on Terminal Properties (New Jersey)	C. 69, Laws of N. J. 1931 (April 7, 1931)	32:1-144 to 146
Payments in Lieu of Taxes on Terminal Properties (New York)	C. 553, Laws of N. Y. 1931 (April 21, 1931)	6971-6973
Rules and Regulations for Vehicular Crossings (New Jersey)	C. 146, Laws of N. J. 1932 (May 2, 1932)	

Holland Tunnel: Transfer of Property in Jersey City (New York)	C. 700, Laws of N. Y. 1933 (May 3, 1933)	–
Rules and Regulations for Vehicular Crossings (New York)	C. 251, Laws of N. Y. 1934 (April 23, 1934)	
George Washington Bridge: Adjustment of State Advances (New York)	C. 293, Laws of N. Y. 1935 (April 4, 1935)	–
George Washington Bridge: Adjustment of State Advances (New Jersey)	C. 165, Laws of N. J. 1935 (April 18, 1935)	32:1-84 to 85
Pier Storage (New York)	C. 711, Laws of N. Y. 1935 (May 4, 1935)	–
Change of Grade Damages (New York)	C. 876, Laws of N. Y. 1935 (May 11, 1935)	6931-6932

Change of Grade Damages (New Jersey)	C. 186, Laws of N. J. 1935 (May 15, 1935)	32:1-155 to 156
Sale of Property Procedure (New York)	C. 203, Laws of N. Y. 1938 (March 29, 1938)	6951-6953
Sale of Property Procedure (New Jersey)	C. 35, Laws of N. J. 1939 (April 5, 1939)	–
Truck Terminals: Financing and Effectuation	C. 163, Laws of N. Y. 1945 (March 14, 1945)	6731-6733, 7001
Truck Terminals: Financing and Effectuation	C. 197, Laws of N. J. 1945 (April 20, 1945)	–
Grain Terminal Bonds: Legality for Investment (New Jersey)		–
General Reserve Fund (New York)	C. 163, Laws of N. Y. 1945 (March 14, 1945) amending C. 48, Laws of N. Y. 1931 (March 4, 1931)	7001-7003

General Reserve Fund (New Jersey)	C. 197, Laws of N. J. 1945 (April 20, 1945) amending C. 5, Laws of N. J. 1931 (March 2, 1931)	32:1-141 to 143
Staten Island Bridges: Repayment of State Advances (New York)	C. 352, Laws of N. Y. 1946 (April 1, 1946)	7051-7058
Staten Island Bridges: Repayment of State Advances (New Jersey)	C. 54, Laws of N. J. 1946 (April 4, 1946)	32:1-140.1 to 140.7
Bus Terminal: Financing and Effectuation (New York)	C. 443, Laws of N. J. 1946 (April 4, 1946)	6701-6706
Bus Terminal: Financing and Effectuation (New Jersey)	C. 95, Laws of N. J. 1946 (April 17, 1946)	32:2-23.1 to 23.5

Marine Terminals: Development (New Jersey)	C. 44, Laws of N. J. 1947 (April 2, 1947) as amended by C. 212, Laws of N. J. 1948 (July 16, 1948)	32:1-35.28 to 35.36b –
Marine Terminals: Development (New York)	C. 631, Laws of N. Y. 1947 (April 5, 1947) as amended by C. 784, Laws of N. Y. 1948 (April 3, 1948)	6671-6678 6671, 6674
Negotiabilty of Convertible Bonds (New Jersey)	C. 45, Laws of N. J. 1947 (April 2, 1947)	–
Negotiability of Convertible Bonds (New York)	C. 632, Laws of N. Y. 1947 (April 5, 1947)	7031-7032

Air Terminals: Financing and Effectuation (New Jersey)	C. 43, Laws of N. J. 1947 (April 2, 1947) as amended by C. 214, Laws of N.J. 1948 (July 16, 1948)	32:1-35.1 to 35.19
Air Terminals: Financing and Effectuation (New York)	C. 802, Laws of N. Y. 1947 (April 11, 1947) as amended by C. 785, Laws of N. Y. 1948 (April 3, 1948)	6631-6647 6638, 6640, 6645
Air Terminals: 1947 Amendments (New Jersey)	C. 330, Laws of N. J. 1947 (June 20, 1947)	32:1-35.8, 35.10, 35.15
Rehousing Residents of Areas Acquired (New York)	C. 534, Laws of N. Y. 1948 (March 29, 1948)	–
Rehousing Residents of Areas Acquired (New Jersey)	C. 97, Laws of N. J. 1948 (May 28, 1948) (expired)	–

Holland Tunnel: Transfer of Property in Jersey City (New York)	C. 423, Laws of N.Y. 1948 (March 23, 1948)	–
Holland Tunnel: Transfer of Property in Jersey City (New Jersey)	C. 213, Laws of N. J. 1948 (July 16, 1948)	–
Account Examination (New Jersey)	C. 90, Laws of N. J. 1950 (May 1, 1950)*	32:2-31 to 2-33
Rules and Regulations for Vehicular Crossing (New York)	C. 774, Laws of N. Y. 1950 (April 18, 1950) as amended by C. 543, Laws of N. Y. 1951 (April 5, 1951)	6801-6817 6808
Rules and Regulations for Vehicular Crossings (New Jersey)	C. 192, Laws of N. J. 1950 (June 7, 1950) (repealed)	32:1-147 to 1-154

* The comparable New York statute was enacted in C. 648, Laws of N. Y. 1929 (April 15, 1929).

Suits against Port Authority (New York)	C. 301, Laws of N. Y. 1950 (March 30, 1950)	7101-7112
Suits against Port Authority (New Jersey)	C. 204, Laws of N. J. 1951 (June 13, 1951)	32:1-157 to 1-168
Rules and Regulations: Agreement Concerning Penalties for Violations (New York)	C. 207, Laws of N. Y. 1951 (March 22, 1951)	6871-6873
Rules and Regulations: Agreement Concerning Penalties for Violations (New Jersey)	C. 205, Laws of N. J. 1951 (June 13, 1951)	32:-1-146.1 to 1-146.3
Negotiability of Convertible Bonds: Consolidated Bonds and Notes: 1953 Amendment (New York)	C. 140, Laws of N. Y. 1953 (March 24, 1953)	7031

Negotiability of Convertible Bonds: Consolidated Bonds and Notes: 1953 Amendment (New Jersey)	C. 169, Laws of N. J. 1953 (May 29, 1953)	–
Consent to Suit: New York International Airport Airlines Leases (New York)	C. 143, Laws of N. Y. 1953 (March 24, 1953)	7131-7136
Consent to Suit: New York International Airport Airlines Leases (New Jersey)	C. 172, Laws of N. J. 1953 (May 29, 1953)	32:1-169 to 1-174
Lincoln Tunnel Third Tube: Authorization to Construct (New Jersey)	C. 11, Laws of N. J. 1954 (March 22, 1954)	–
Lincoln Tunnel Third Tube: Authorization to Construct (New York)	C. 180, Laws of N. Y. 1954 (March 23, 1954)	6502n, 6511n, 6517

Lincoln Tunnel Parking Lot: Authorization (New York)	C. 810, Laws of N. Y. 1955 (April 28, 1955)	6504
Lincoln Tunnel Parking Lot: Authorization (New Jersey)	C. 51, Laws of N. J. 1955 (June 9, 1955)	–
Narrows Bridge: Authorization (New York)	C. 808, Laws of N. Y. 1955 (April 28, 1955)	6551-6565
Narrows Bridge: Authorization (New Jersey)	C. 12, Laws of N. J. 1956) (April 3, 1956)	32:2-23.6 to 23:19
Newark Bay-Hudson County Extension: Authorizing Port Authority Contribution (New York)	C. 444, Laws of N. Y. 1956 (April 9, 1956)	6751-6754
Newark Bay-Hudson County Extension: Authorizing Port Authority Contribution (New Jersey)	C. 16, Laws of N. J. 1956 (April 10, 1956)	32:2-34 to 2-36

George Washington Bridge: Second Deck Improvement (New York)	C. 807, Laws of N. Y. 1955 (April 28, 1955)	6502, 6505, 6512, 6514, 6516, 6517, 6522
George Washington Bridge: Second Deck Improvement (New Jersey)	C. 156, Laws of N. J. 1956 (November 20, 1956)	–
Commuter Railroad Cars: Purchasing, Financing and Rental (New York)	C. 638, Laws of N. Y. 1959 (April 21, 1959)	6771-6778
Commuter Railroad Cars: Purchasing, Financing and Rental (New Jersey)	C. 25. Laws of N. J. 1959 (May 4, 1959)	32:2-23.20 to 23.26
Hudson Tubes – World Trade Center (New Jersey)	C. 8, Laws of N. J. 1962 (February 8, 1962)	32:1-35.50 to 35.68
Hudson Tubes – World Trade Center (New York)	C. 209, Laws of N. Y. 1962 (March 27, 1962)	6601-6618

Port Authority of New York and New Jersey – Change of Name (New Jersey)	C. 69, Laws of N. J. 1972 (June 20, 1972)	32:1-4
Port Authority of New York and New Jersey – Change of Name (New York)	C. 531, Laws of N. Y. 1972 (May 24, 1972)	6404
Air Terminal and Marine Terminal Access Improvement Projects (New Jersey)	C. 365, Laws of N. J. 1977, (February 1, 1978)	–
Air Terminal and Marine Terminal Access Improvement Projects (New York)	C. 792, Laws of N. Y. 1978,	–
Enforcement and Review of Employment Relations Panel Orders; Temporary Relief (New Jersey)	C. 363, Laws of N. J. 1977 (February 1, 1978)	32:1-175 to 176
Enforcement and Review of Employment Relations Panel Orders; Temporary Relief (New York)	C. 599, Laws of N. Y. 1977 (August 1, 1977)	7141-7142

Effectuation of Industrial Development Projects and Use of Port Authority Revenues (New Jersey)	C. 110, Laws of N. J. 1978 (August 24, 1978)	32:1-35.72 to 35.93
Effectuation of Industrial Development Projects and Use of Port Authority Revenues (New York)	C. 651, Laws of N. Y. 1978 (July 25, 1978)	7171-7192
Acquisition, Development, Financing and Transfer of Buses and Ancillary Bus Facilities (New Jersey)	C. 33, Laws of N. J. 1979, (March 1, 1979) as amended by C. 407, Laws of N. J. 1981 (January 7, 1982)	32:2-23.27 to 23.42
Acquisition, Development, Financing and Transfer of Buses and Ancillary Bus Facilities (New York)	C. 12, Laws of N. Y. 1979, as amended by C. 314, Laws of N. Y. 1981 (June 29, 1981)	7201-7217

Air and Marine Terminal Facilities – Certain Improvement Projects (New Jersey)	C. 157, Laws of N. J. 1980 (November 26, 1980)	32:1-35.27b-27d; 32:1-35.28; 32:1-35.30
Air and Marine Terminal Facilities – Certain Improvement Projects (New York)	C. 470, Laws of N. Y. 1980 (June 23, 1980)	6673
Waterfront Development Projects (New Jersey)	C. 9, Laws of N. J. 1983 (January 18, 1983)	32:1-35.36c to 32:1-35.36k
Waterfront Development Projects (New York)	C. 676-677, Laws of N. Y. 1984 (August 1, 1984)	6673
OTHER NEW JERSEY LEGISLATION		
Commissioners: Appointment and Removal	C. 152, Laws of N. J. 1921 (April 7, 1921)	32:2-2 to 2-5
Investigation of Taxation of Port Authority Property: Appointment of Commission	Joint Resolution No. 1 Laws of N. J. 1925 (Feb. 3, 1925)	

Suburban Transit Study	C. 277, Laws of N. J. 1927 (March 29, 1927)	–
Dry-Dock Study	N. J. Concurrent Resolution, 1928 (January 16, 1928)	–
Hoboken Piers: Recommendation of Sale to Port Authority	N. J. Joint Resolution, 1931 (February 2, 1931)	–
Raritan Bay Bridge Study	Joint Resolution No. 10 Laws of N. J. 1931 (April 22, 1931)	–
Raritan Bay Bridge: Recommendation of Federal Funds	Joint Resolution No. 8 Laws of N. J. 1935 (May 18, 1935)	–
Suburban Transit Study: Request for Report	Joint Resolution No. 6 Laws of N. J. 1936 (June 22, 1936)	–

Suburban Transit Study: Continuation and Extension	Joint Resolution No. 1, Laws of N. J. 1938 (February 21, 1938)	–
Bonds to Refund Series F and FF Bonds: Legality for Investment	C. 189, Laws of N. J. 1939 (July 11, 1939)	–
Toll Investigation: Staten Island Bridge	N. J. Concurrent Resolution, 1940 (March 18, 1940)	–
Dry Dock: Request for Construction	N. J. Concurrent Resolution, 1940 (June 13, 1940)	–
Toll Investigation: Include All Crossings	N. J. Concurrent Resolution, 1940 (June 3, 1940)	–
Lincoln Tunnel Approaches: Acceptance by State of New Jersey	C. 52, Laws of N. J. 1943 (March 27, 1943)	–

Port Raritan District Commission: Abolition	C. 85, Laws of N. J. 1944 (April 6, 1944)	–
Municipal Employees: Pension Rights upon Transfer to Port Authority	C. 250, Laws of N. J. 1948 (July 21, 1948)	–
Air Terminals: Condemnation at Teterboro Airport	C. 81, Laws of N. J. 1949 (May 6, 1949)	32:1-35.18
Transportation of Explosives: Interstate and Reciprocal Legislation	Joint Resolution No. 12, Laws of N. J. 1949 (June 14, 1949)	–
Rules and Regulations: Air and Marine Terminal Highways	C. 239, Laws of N. J. 1951 (June 19, 1951)	–
Air and Marine Terminal Condemnation Procedure: 1953 General Amendments	C. 31, Laws of N. J. 1953 (March 19, 1953)	32:1-154.18 to 154.24

Investigation of Construction of Lincoln Tunnel Third Tube	New Jersey Assembly Resolution, 1953 (May 18, 1953)	–
Rules and Regulations: Air and Marine Terminals: Penalties for Smoking	C. 170, Laws of N. J. 1953 (May 29, 1953)	32:1-146.4 to 146.5
Rules and Regulations: Air, Bus and Marine Terminals: Penalties for Loitering, Begging, etc.	C. 171, Laws of N. J. 1953 (May 29, 1953)	32:1-146.6 to 146.7
Air Terminal Condemnation Procedure: 1953 Supplement Restoring Advisory Commissioners	C. 374, Laws of N. J. 1953 (August 13, 1953)	–
Marine Terminal Condemnation Procedure: 1953 Supplement Restoring Advisory Commissioners	C. 375, Laws of N. J. 1953 (August 13, 1953)	–

General and Refunding Bonds as Legal Investments	C. 81, Laws of N. J. 1953 (April 15, 1953)	32:2-24.1
Administration of Criminal and Civil Justice	C. 123, Laws of N. J. 1957 (July 3, 1957)	—
Joint Purchases by the State and the Port Authority	C. 40, Laws of N. J. 1959 (May 28, 1959)	—
Rules and Regulations Hudson Tubes and Hudson Tubes Extensions.	C. 64, Laws of N. J. 1964 (May 21, 1964)	—

OTHER NEW YORK LEGISLATION

COMMISSIONERS: Appointment and Removal	C. 203, Laws of N. Y. 1921 (April 15, 1921)	—
Subpoena Power	C. 623, Laws of N. Y. 1924 (May 5, 1924)	6462-6468
Investigation of Taxation of Port Authority Property: Appointment of Commission	C. 1, Laws of N. Y. 1925 (February 4, 1925)	—
Veto Power of Governor	C. 700, Laws of N. Y. 1927 (April 6, 1927)	7151-7154
Port Authority Police as Peace Officers	C. 388, Laws of N. Y. 1928 (March 17, 1928)	—
Inland Terminal Bonds: Legality for Investment	C. 486, Laws of N. Y. 1928 (March 21, 1928)	—
COMMISSIONERS Appointment and Removal	C. 422, Laws of N. Y. 1930 (April 12, 1930)	—

Hoboken Piers: Recommendation of Sale to Port Authority	New York Concurrent Resolution, 1931 (Feb. 2, 1931)	—
Steamship Terminal Bonds: Legality for Investment	C. 46, Laws of N. Y. 1931 (March 4, 1931)	—
George Washington Bridge: Grant of Land by the State	C. 543, Laws of N. Y. 1931 (April 21, 1931)	—
Vehicular Rules and Regulations: Jurisdiction of Magistrates' Courts	C. 599, Laws of N. Y. 1932) (April 1, 1932)	—
Security for Port Authority Deposits	C. 442, Laws of N. Y. 1933 (April 26, 1933)	—
Freight Tunnel: Construction with Federal Funds Urged	New York Concurrent Resolution, 1935 (Feb. 27, 1935)	—

North River Bridge Company: Recommendation for Charter Repeal	New York Concurrent Resolution, 1935 (March 7, 1935)	—
General and Refunding Bonds: Legality for Investment	C. 24, Laws of N. Y. 1937 (Feb. 24, 1937)	—
Banks and Trust Companies Investments: Restrictions and Exceptions	C. 619, Laws of N. Y. 1937 (May 25, 1937)	—
	as amended by C. 459, Laws of N. Y. 1938 (April 4, 1938)	—
Security for Port Authority Deposits	C. 680, Laws of N. Y. 1937 (May 27, 1937) amending C. 442, Laws of N. Y. 1933 (April 26, 1933)	—
George Washington Bridge: Adjustment of State Advances	C. 253, Laws of N. Y. 1938 (March 29, 1938)	—

Bonds to Refund Series F and FF Bonds: Legality for Investment	C. 284, Laws of N. Y. 1939 (April 13, 1939)	–
Port Authority Bonds: Legality for Investment of State Funds; Security for Deposits of State Funds	C. 593, Laws of N. Y. 1940 (April 18, 1940)	–
Grain Terminal: Transfer to Port Authority	C. 410, Laws of N. Y. 1944 (March 30, 1944)	–
	as amended by C. 899, Laws of N. Y. 1945 (April 20, 1945)	–
Port Authority Police as Peace Officers	C. 317, Laws of N. Y. 1947 (March 22, 1947)	
Condemnation: Optional Procedure	C. 819, Laws of N. Y. 1947 (April 12, 1947)	6902
State Retirement System: Mandatory Retirement Age of Port Authority Employees	C. 503, Laws of N. Y. 1948 (March 29, 1948)	–

Port Authority Bonds: Legality for Investment of State Funds: Security for Deposit of State Funds	C. 870, Laws of N. Y. 1948 (April 16, 1948)	–
Grain Terminal: Transfer to Port Authority: 1949 Amendment concerning Halleck Street	C. 432, Laws of N. Y. 1949 (April 6, 1949)	–
Rules and Regulations: Jurisdiction of Magistrates' Court: 1951 Amendment	C. 205, Laws of N. Y. 1951 (March 22, 1951)	–
Rules and Regulations: Air and Marine Terminal Highways	C. 206, Laws of N. Y. 1951 (March 22, 1951)	6831-6837
Steamship Terminal Bonds: Legality for Investment: 1951 Amendment	C. 635, Laws of N. Y. 1951 (April 7, 1951)	–
Rules and Regulations: Air and Bus Terminals: Penalties for Loitering, Begging, etc.	C. 139, Laws of N. Y. 1953 (March 24, 1953)	–

Consolidated Bonds and Notes: Legality for Investment	C. 141, Laws of N. Y. 1953 (March 24, 1953)	–
Rules and Regulations: Air and Marine Terminals: Penalties for Smoking	C. 142, Laws of N. Y. 1953 (March 24, 1953)	6851-6852
Verification of Complaints by Port Authority Police Officers	C. 454, Laws of N. Y. 1953 (April 2, 1953)	–
New York City Transit Authority: Appointment of Commissioner by Port Authority	C. 200, Laws of N. Y. 1953 (March 25, 1953)	–
	as amended by C. 201, Laws of N. Y. 1953 (March 25, 1953)	–
	and by C. 881, Laws of N. Y. 1953 (June 26, 1953)	–
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Immunity of Witnesses in Hearings Before Port Authority	C. 891, Laws of N. Y. 1953 (July 2, 1953)	6464
Narrows Bridge: Authorization: Triborough Bridge & Tunnel Authority	C. 806, Laws of N. Y. 1955 (April 28, 1955)	–
Approval or Veto by Governor of Port Authority Minutes– Extension of Time for Review	C. 215, Laws of N. Y. 1956 (April 2, 1956)	7152
George Washington Bridge: Federal Aid: Agreement with New York State	C. 313, Laws of N. Y. 1958 (March 22, 1958)	–
Port Authority Bonds: Legality for Investment of State Funds; Security for Deposits of State Funds	C. 777, Laws of N. Y. 1958 (April 15, 1958)	–
Brooklyn-Port Authorty Piers: Condemnation	C. 982, Laws of N. Y. 1958 (April 24, 1958)	6676-6677

Investment in Port Authority Bonds by Industrial Banks	C. 983, Laws of N. Y. 1958 (April 24, 1958)	–
Appropriation for Purchase of Railroad Cars and Other Purposes	C. 639, Laws of N. Y. 1959 (April 21, 1959)	6777n
Railroad Commuter Cars; Purchasing, Financing and Rental	C. 319, Laws of N. Y. 1962 (April 4, 1962)	6777
Effectuation of Port District Capital Improvement Projects	C. 551, Laws of N. Y. 1982 (July 20, 1982)	6402 (Pocket Part)
Minutes of Meeting Filed With State Legislatures	C. 33, Laws of N. Y. 1987 (April 21, 1987)	6408-a
Tax Law; Furnishing of Certain Information	C. 598, Laws of N. Y. 1988 (September 1, 1988)	–
Bridges – Comprehensive Management and Inspection Program	C. 781, Laws of N. Y. 1988 (December 29, 1988)	–

Traffic Regulations for Interstate Vehicular Crossings

Interstate vehicular crossings; establishment of rules and regulations
N.Y. Unconsol. L. § 6801; N.J.S.A. 32:1-154.1

To the end that the interstate vehicular crossings operated by the port of New York authority (hereinafter called the "Port Authority"), pursuant to the compact of April thirtieth, nineteen hundred twenty-one between the states of New York and New Jersey creating the port authority, may be efficiently and safely operated in the interest of the people of the states of New York and New Jersey and of the nation, the following rules and regulations governing traffic on vehicular crossings operated by the port authority, set forth in sections two through eight, inclusive, hereof, are hereby adopted by the legislatures of the two states, and are declared to be binding upon all persons and corporations affected thereby.

Payment of tolls and charges
N.Y. Unconsol. L. § 6802; N.J.S.A. 32:1-154.2

No traffic shall be permitted in or upon vehicular crossings except upon the payment of such tolls and other charges as may from time to time be prescribed by the port authority. It is hereby declared to be unlawful for any person to refuse to pay, or to evade or to attempt to evade the payment of such tolls or other charges.

Manner of operation of vehicles; construction, equipment and loading of vehicles
N.Y. Unconsol. L. § 6803; N.J.S.A. 32:1-154.3

No vehicle shall be operated carelessly or negligently, or in disregard of the rights or safety of others, or without due caution and circumspection, or at a speed or in a manner

so as to endanger unreasonably or to be likely to endanger unreasonably persons or property, or while the operator thereof is under the influence of intoxicating liquors or any narcotic or habit-forming drug, nor shall any vehicle be so constructed, equipped or loaded as to endanger unreasonably or to be likely to endanger unreasonably persons or property.

Compliance with orders and traffic lights, signs and signals
N.Y. Unconsol. L. § 6804; N.J.S.A. 32.1-154.4

All persons in or upon vehicular crossings must at all times comply with any lawful order, signal or direction by voice or hand of any member of the port authority police force. When traffic is controlled by traffic lights, signs or by mechanical or electrical signals, such lights, signs and signals shall be obeyed unless a port authority police officer directs otherwise.

Keeping to the right and within traffic lanes
N.Y. Unconsol. L. § 6805; N.J.S.A. 32:1-154.5

Unless otherwise directed, vehicles shall at all times stay to the right of the center of all roadways except in the case of one-way roadways; slow-moving vehicles shall remain as close as possible to the right-hand edge or curb of the roadway; and where a roadway is marked with traffic lanes vehicles shall not cross markings.

Operators' licenses; registration of vehicles
N.Y. Unconsol. L. § 6806; N.J.S.A. 32:1-154.6

No person shall operate a motor vehicle in or upon any part of a vehicular crossing unless he is duly authorized to operate motor vehicles in the state in which such part of the vehicular crossing is located. No motor vehicle shall be permitted in or upon any part of a vehicular crossing

which is not registered in accordance with the provisions of the law of the state in which such part of the vehicular crossing is located.

Accidents; stopping at scene of; assistance and information to be rendered; report
N.Y. Unconsol. L. § 6807; N.J.S.A. 32:1-154.7

The operator of any vehicle involved in an accident resulting in injury or death to any person or damage to any property shall immediately stop such vehicle at the scene of the accident, render such assistance as may be needed, and give his name, address, and operator's license and registration number to the person injured or to any officer or witness of the injury. The operator of such vehicle shall make a report of such accident in accordance with the law of the state in which such accident occurred.

Transportation of explosive or combustible materials, or poisonous substances, liquids or gases
N.Y. Unconsol. L. § 6808; N.J.S.A. 32:1-154.8

No person shall transport in or upon a vehicular crossing, any dynamite, nitroglycerin, black powder, fireworks, blasting caps or other explosives, gasoline, alcohol, ether, liquid shellac, kerosene, turpentine, formaldehyde or other inflammable or combustible liquids, ammonium nitrate, sodium chlorate, wet hemp, powdered metallic magnesium, nitro-cellulose film, peroxides or other readily inflammable solids or oxidizing materials, hydrochloric acid, sulfuric acid or other corrosive liquids, prussic acid, phosgene, arsenic, carbolic acid, potassium cyanide, tear gas, lewisite or any other poisonous substances, liquids or gases, or any compressed gas, or any radio-active article, substance or materials, at such time or place or in such manner or condition as to endanger unreasonably or as to be likely to endanger unreasonably persons or property.

Violations; punishment; exclusion of vehicles involved from crossings
N.Y. Unconsol. L. § 6809; N.J.S.A. 32:1-154.9

Violations of the rules and regulations set forth in sections two through eight, inclusive, hereof, committed within the territorial limits of either state shall be punishable as may be provided by the laws of such state but the penalties prescribed by either state shall not preclude the port authority from excluding from vehicular crossings permanently or for a specified time, all vehicles violating any of the said rules and regulations, as well as other vehicles owned or operated by the owner or operator of such vehicle.

Definitions
N.Y. Unconsol. L. § 6810; N.J.S.A. 32:1-154.10

The following terms as used herein shall have the indicated meanings:

"Traffic" shall include pedestrians, ridden animals, herded animals and vehicles whether moved by human power or otherwise.

"Vehicular crossings" shall include not only bridges and tunnels operated by the port authority, but also their plazas and approaches, but shall not include any lands granted by the port authority to the states of New York or New Jersey or to a municipality for street or highway purposes even though such street or highway constitutes a means of access to or egress from such vehicular crossing.

Separability
N.Y. Unconsol. L. § 6811; N.J.S.A. 32:1-154.11

If any term or provision of this act shall be declared unconstitutional or ineffective in whole or in part by a court

of competent jurisdiction, then to the extent that it is not unconstitutional or ineffective, such term or provisions shall be enforced and effectuated, nor shall such determination be deemed to invalidate the remaining terms or provisions thereof.

Repeal of prior laws
N.Y. Unconsol. L. § 6812; N.J.S.A. 32:1-147

The two said states agree that chapter two hundred fifty-one of the laws of New York of nineteen hundred thirty-four, entitled "An act establishing rules and regulations for the control of traffic on the interstate bridges and tunnels operated by the Port of New York Authority and prescribing proceedings and penalties for their violations", and chapter one hundred forty-six of the pamphlet laws of New Jersey, nineteen hundred thirty-two, entitled "An act establishing rules and regulations for the control of traffic on the inter-state bridges and tunnels operated by the Port of New York Authority and prescribing proceedings and penalties for their violations", shall be and are repealed as of the date this act takes effect.

Provisions of act as supplemental to powers of Port Authority
N.Y. Unconsol. L. § 6813; N.J.S.A. 32:1-154.13

This section and the preceding sections hereof, together with the corresponding sections of the act of the state of New Jersey concurring herein in accordance with section seventeen hereof, shall constitute an agreement between the states of New York and New Jersey supplementary to the compact between the two states dated April thirtieth, nineteen hundred twenty-one, and amendatory thereof, and shall be liberally construed to effectuate the purposes of said compact and of the agreements of the two states amendatory thereof or supplemental thereto; and shall be

construed to be in aid of and supplemental to and not in limitation of or in derogation of the powers heretofore conferred upon or delegated to the port authority.

Punishment of violations constituting felony or misdemeanor if committed on public road, etc. of municipality
N.Y. Unconsol. L. § 6814; N.J.S.A. 1-154.14

If the violation within the state of any of the rules and regulations set forth in section two through eight, inclusive, hereof, including but not limited to those regarding the payment of tolls, would have been a felony, misdemeanor or other punishable offense if committed on any public road, street, highway or turnpike in the municipality in which such violation occurred, it shall be tried and punished in the same manner as if it had been committed on such public road, street, highway or turnpike.

Punishment of violations resulting in personal injury or death, or property damage over $5000
N.Y. Unconsol. L. § 6815; N.J.S.A. 32:1-154.15

Notwithstanding the provisions of section fourteen hereof, if the violation within the state of the rule and regulation set forth in section eight hereof shall result in injury or death to a person or persons or damage to property in excess of the value of five thousand dollars, such violation shall constitute a felony.

Punishment of violations constituting misdemeanor
N.Y. Unconsol. L. § 6816; N.J.S.A. 32:1-154.16

Except as provided in sections fourteen and fifteen hereof, any violation within the state of any of the rules and regulations set forth in sections two through eight,

inclusive, hereof, including but not limited to those regarding the payment of tolls, shall constitute a misdemeanor and shall be punishable as an offense triable in a magistrate's court by a fine not exceeding five hundred dollars or by imprisonment not exceeding sixty days or by both such fine and imprisonment.

Effective date
N.Y. Unconsol. L. § 6817; N.J.S.A. 32:1-154.17

This act shall take effect upon the enactment into law by the state of New Jersey of legislation having an identical effect with sections one through thirteen, inclusive, of this act, but if the state of New Jersey shall have already enacted such legislation, this act shall take effect immediately.

Traffic Regulations for Air and Marine Terminals

Rules and regulations applicable to air and marine terminal highways
N.Y. Unconsol. L. § 6831; N.J.S.A. 32:1-154.18

The port of New York authority (hereinafter called the "port authority") having duly adopted the following rules and regulations governing traffic on air terminal highways and marine terminal highways in the air terminals and marine terminals operated by it within the territorial limits of the state of New York, hereinafter set forth in this section, the penalties and procedures for their enforcement prescribed in sections two, three and four shall apply to violations thereof.

RULES AND REGULATIONS

1. The following terms as used herein shall have the indicated meanings:

"Air terminals" shall mean developments operated by the port authority consisting of runways, hangars, control

towers, ramps, wharves, bulkheads, buildings, structures, parking areas, improvements, facilities or other real property necessary, convenient or desirable for the landing, taking off, accommodation and servicing of aircraft of all types, including but not limited to airplanes, airships, dirigibles, helicopters, gliders, amphibians, sea-planes, or any other contrivance now or hereafter used for the navigation of or flight in air or space, operated by carriers engaged in the transportation of passengers or cargo, or for the loading, unloading, interchange or transfer of such passengers or their baggage, or such cargo, or otherwise for the accommodation, use or convenience of such passengers, or such carriers or their employees, or for the landing, taking off, accommodation and servicing of aircraft owned or operated by persons other than carriers.

"Air terminal highway" shall mean and include those portions of an air terminal designated and made available temporarily or permanently by the port authority to the public for general or limited highway use.

"Marine terminals" shall mean developments operated by the port authority consisting of one or more piers, wharves, docks, bulkheads, slips, basins, vehicular roadways, railroad connections, side tracks, sidings or other buildings, structures, facilities or improvements, necessary or convenient to the accommodation of steamships or other vessels and their cargoes or passengers.

"Marine terminal highway" shall mean and include those portions of a marine terminal designated and made available temporarily or permanently by the port authority to the public for general or limited highway use.

"Traffic" shall mean and include pedestrians, animals and vehicles.

2. No vehicle shall be operated on any air terminal highway or marine terminal highway carelessly or negligently, or in disregard of the rights or safety of others, or without due caution and circumspection, or at a speed or in a manner so as to endanger unreasonably persons or property, or while the operator thereof is under the influence of intoxicating liquors or any narcotic or habit-forming drug, nor shall any vehicle be operated thereon if it is so constructed, equipped or loaded as to endanger unreasonably or to be likely to endanger unreasonably persons or property.

3. All persons on any air terminal highway or marine terminal highway must at all times comply with any lawful order, signal or direction by voice or hand of any member of the port authority police force. When traffic is controlled by traffic lights, signs or by mechanical or electrical signals, such lights, signs and signals shall be obeyed unless a port authority police officer directs otherwise.

4. Unless otherwise directed, all vehicles on any air terminal highway or marine terminal highway shall at all times stay to the right of the center of the roadway, except in the case of one-way roadways; slow-moving vehicles shall remain as close as possible to the right-hand edge or curb of the roadway; and where a roadway is marked with traffic lanes vehicles shall not cross markings.

5. No person shall operate a motor vehicle on an air terminal highway or marine terminal highway unless he is duly authorized to operate such vehicle on state and municipal highways in the state in which such air terminal highway or marine terminal highway is located, or unless he is especially authorized by the port authority to operate motor vehicles on such air terminal highway or marine terminal highway. No motor vehicle shall be permitted on

any air terminal highway or marine terminal highway unless it is registered in accordance with the provisions of the law of the state in which such air terminal highway or marine terminal highway is located, or unless it is especially authorized by the port authority to be operated on such air terminal highway or marine terminal highway.

6. The operator of any vehicle involved in an accident on an air terminal highway or marine terminal highway which results in injury or death to any person or damage to any property shall immediately stop such vehicle at the scene of the accident, render such assistance as may be needed, and give his name, address, and operator's license and registration number to the person injured or to any officer or witness of the injury. The operator of such vehicle shall make a report of such accident in accordance with the law of the state in which such accident occurred.

7. No person shall transport on any air terminal highway or marine terminal highway any dynamite, nitroglycerin, black powder, fireworks, blasting caps or other explosives, gasoline, alcohol, ether, liquid shellac, kerosene, turpentine, formaldehyde or other inflammable or combustible liquids, ammonium nitrate, sodium chlorate, wet hemp, powdered metallic magnesium, nitrocellulose film, peroxide or other readily inflammable solids or oxidizing materials, hydrochloric acid, sulfuric acid or other corrosive liquids, prussic acid, phosgene, arsenic, carbolic acid, potassium cyanide, tear gas, lewisite, or any other poisonous substances, liquids or gases, or any compressed gas, or any radioactive article, substance or material, at such time or place or in such manner or condition as to endanger unreasonably or as to be likely to endanger unreasonably persons or property; nor shall any person park any vehicle, or permit the same to remain halted on any air terminal highway or marine terminal highway containing

any of the foregoing, at such time or place or in such manner or condition as to endanger unreasonably or as to be likely to endanger unreasonably persons or property.

8. No person shall park a vehicle or permit the same to remain halted on any air terminal highway or marine terminal highway except at such places and for such periods of time as may be prescribed or permitted by the port authority.

Trial and punishment of violations constituting felonies if committed on public street or highway
N.Y. Unconsol. L. § 6832; N.J.S.A. 32:1-154.19

If the violation within the state of any of the rules and regulations set forth in section one hereof, would have been a felony, misdemeanor or other punishable offense if committed on any public road, street, highway or turnpike in the municipality in which such violation occurred, it shall be tried and punished in the same manner as if it had been committed on such public road, street, highway or turnpike.

Violation of Regulation 7 as felony under certain circumstances
N.Y. Unconsol. L. § 6833; N.J.S.A. 32:1-154.20

Notwithstanding the provisions of section two hereof, if the violation within the state of the rule and regulation numbered seven and set forth in section one hereof shall result in injury or death to a person or persons or damage to property in excess of the value of five thousand dollars, such violation shall constitute a felony.

Violations as misdemeanors; trial and punishment
N.Y. Unconsol. L. § 6834; N.J.S.A. 32:1-154.21

Except as provided in sections two and three hereof, any violation within the state of any of the rules and regulations

set forth in section one hereof, shall constitute a misdemeanor and shall be punishable as an offense triable in a magistrate's court by a fine not exceeding five hundred dollars or by imprisonment not exceeding sixty days or by both such fine and imprisonment.

Exclusion of vehicles for violation of regulations
N.Y. Unconsol. L. § 6835; N.J.S.A. 32:1-154.22

The penalties above prescribed shall not preclude the port authority from excluding from any air terminal highway or marine terminal highway, permanently or for a specified time, all vehicles violating any of the rules and regulations set forth in section one hereof, as well as other vehicles owned or operated by the owner or operator of such vehicle.

State's power to enact laws respecting Port Authority unimpaired
N.Y. Unconsol. L. § 6836; N.J.S.A. 32:1-154.23

Nothing herein contained shall be construed to affect, diminish or impair the power of this state to enact any law, or to impair or diminish, or as recognition of the impairment or dimunition of any power of this state, legislative or otherwise, with respect to the port authority, its properties, or persons or property thereon.

Effective date
N.Y. Unconsol. L. § 6837; N.J.S.A. 32:1-154.24

This act shall take effect upon the adoption by the states of New York and New Jersey of concurrent legislation providing that either state, without the consent or concurrence of the other state, may from time to time prescribe, amend,

modify or rescind penalties for violations within its territorial limits of any rule or regulation, otherwise authorized, of the port of New York authority, and procedures for the enforcement of such penalties, but in no event prior to July first, nineteen hundred fifty-one; provided, however, that if, prior to July first, nineteen hundred fifty-one, the states of New York and New Jersey have enacted such legislation, this act shall take effect July first, nineteen hundred fifty-one.

Smoking Regulations for Air and Marine Terminals

Areas where smoking or carrying lighted substances prohibited
N.Y. Unconsol. L. § 6851; N.J.S.A. 32:1-146.4

The port of New York authority (hereinafter called the "port authority") having duly adopted the following rule and regulation, hereinafter set forth in this section, in relation to smoking at, on, or in air terminals and marine terminals operated by it within the territorial limits of the state of New York, the penalties and procedures for its enforcement prescribed in section two shall apply to violations thereof.

1. No person shall smoke, carry, or possess a lighted cigarette, cigar, pipe, match or other lighted instrument capable of causing naked flame in or about any area, building or appurtenance of an air terminal, owned or operated by the port authority, or in or upon any area, bulkhead, dock, pier, wharf, warehouse, building, structure or shed of a marine terminal, owned or operated by the port authority, where smoking has been prohibited by the port authority and where appropriate signs to that effect have been posted, or on the open deck of any ship, lighter, carfloat, scow or other similar floating craft or equipment when berthed or moored at such dock, wharf, pier or to a vessel made fast thereto.

Penalty for violation of regulations
N.Y. Unconsol. L. § 6852; N.J.S.A. 32:1-146.5

Any violation of the rule and regulation set forth in section one hereof shall be punishable as an offense triable in a magistrate's court, for a first offense, by a fine of not more than fifty dollars or imprisonment for not more than thirty days or both; for a second offense, by a fine of not less than twenty-five dollars nor more than one hundred dollars or imprisonment for not more than 60 days or both; for a third or any other subsequent offense, by a fine of not less than fifty dollars nor more than two hundred dollars or by imprisonment for not more than sixty days or both.

Rules and Regulations Governing Operation of Hudson Tubes

Prohibited conduct
N.Y. Unconsol. L. § 6861; N.J.S.A. 32:1-146.8

The port of New York authority (hereinafter called "port authority") having duly adopted the following rules and regulations, hereinafter set forth in this section in relation to conduct within the territorial limits of the state of New York and at, on or in the Hudson tubes and Hudson tubes extensions operated by its wholly-owned subsidiary the port authority trans-Hudson corporation (hereinafter called "PATH"), the penalties and procedures for their enforcement prescribed in section two shall apply to violations thereof.

RULES AND REGULATIONS

(1) No person shall smoke, carry or possess a lighted cigarette, cigar, pipe, match or any lighted instrument causing naked flame in or about any area, building or appurtenance or in any cars or other rolling stock of the Hudson tubes or Hudson tubes extensions where smoking has been prohibited by PATH and where appropriate signs to that effect have been posted.

(2) No person, unless duly authorized by PATH, shall in or upon any area, building, appurtenance, car or other rolling stock of the Hudson tubes or Hudson tubes extensions sell or offer for sale any article of merchandise or solicit any business or trade, including the carrying of bags for hire, the shining of shoes or bootblacking, or shall entertain any persons by singing, dancing or playing any musical instrument or solicit alms. No person, unless duly authorized by PATH, shall post, distribute or display commercial signs, circulars or other printed or written matter in or upon the Hudson tubes or Hudson tubes extensions.

(3) No person, who is unable to give satisfactory explanation of his presence, shall loiter about any car, or other rolling stock, area, building or appurtenance of the Hudson tubes or Hudson tubes extensions, or sleep therein or thereon.

(4) No person not authorized by PATH shall be permitted in or upon any car or other rolling stock or station or platform or parking facility within the Hudson tubes or Hudson tubes extensions, except upon payment in full of such fares, fees and other charges as may from time to time be prescribed by PATH. No person shall refuse to pay or evade or attempt to evade the payment in full of such fares, fees and other charges.

(5) No person shall spit upon, litter or create a nuisance or other insanitary condition in or on any car or other rolling stock, area, building or appurtenance of the Hudson tubes or Hudson tubes extensions.

(6) No person shall enter any car or other rolling stock, area, building or appurtenance of the Hudson tubes or Hudson tubes extensions with any animal, except an animal properly confined in an appropriate container or a guide dog properly harnessed and muzzled, accompanying a blind person carrying a certificate of identification issued by a guide dog school.

(7) No person shall get on any car or other rolling stock of the Hudson tubes or Hudson tubes extensions while it is in motion for the purpose of obtaining transportation thereon as a passenger nor shall any person wilfully obstruct, hinder or delay the passage of any such car or rolling stock. No person not authorized by PATH shall walk upon or along any right-of-way or related trackage of the Hudson tubes or Hudson tubes extensions.

Penalty for violation
N.Y. Unconsol. L. § 6862; N.J.S.A. 32:1-146.9

Any violation of the provisions of subdivision one of section one hereof, shall be an offense and shall be punishable for a first conviction thereof by a fine of not more than fifty dollars or imprisonment for not more than thirty days or both; for a second such conviction by a fine of not less than twenty-five dollars nor more than one hundred dollars or imprisonment for not more than sixty days or both; for a third or any other subsequent such conviction, by a fine of not less than fifty dollars nor more than two hundred dollars or by imprisonment for not more than sixty days or both. Any person who is guilty of violating any other

provision of section one hereof shall be guilty of an offense and shall be punishable by a fine not exceeding ten dollars or by imprisonment not exceeding thirty days or by both such fine and imprisonment for each conviction thereof.

Actions for injunction against the Authority
N.Y. Unconsol. L. § 7105; N.J.S.A. 32:1-161

The foregoing consent does not extend to suits, actions or proceedings for judgments, orders or decrees restraining, enjoining or preventing the port authority from committing or continuing to commit any act or acts, other than suits, actions or proceedings by the attorney general of New York or by the attorney general of New Jersey — each of whom is hereby authorized to bring such suits, actions or proceedings in his discretion on behalf of any person or persons whatsoever who requests him so to do except in the cases excluded by sections two, three and four of this act; provided, that in any such suit, action or proceeding, no judgment, order or decree shall be entered except upon at least two days' prior written notice to the port authority of the proposed entry thereof.

MOTION FILED
DEC 1 4 1989

No. 89-386

(3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PORT AUTHORITY
TRANS-HUDSON CORPORATION,
Petitioner,
v.
PATRICK FEENEY,
Respondent.

PORT AUTHORITY
TRANS-HUDSON CORPORATION,
Petitioner,
v.
CHARLES T. FOSTER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Pursuant to Rule 36.3 of the Rules of the Court, *amici* respectfully move this Court for leave to file the attached brief *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the failure of respondents' counsel to respond to *amici*'s request for consent.

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in the issue presented here: how to determine when States should be deemed to have waived their Eleventh Amendment immunity against suit in federal court. Proper resolution of this question will limit the circumstances in which States improperly are forced to appear in federal court against their will, and will make it unnecessary for federal judges to determine their jurisdiction by guessing at the meaning of ambiguous state laws. Beyond that, States have an interest in assuring that the rules governing the interpretation of waivers of immunity remain constant; because state legislatures enact laws against the background of those rules, a change in the Court's interpretive approach may work changes in the effective meaning of existing state laws.

Because of the importance of these issues to the States, *amici* seek leave to file this brief to assist the Court in the resolution of this case.

Respectfully submitted,

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December 14, 1989

QUESTION PRESENTED

Amici will address the following question:

Whether the court of appeals properly applied this Court's standards in concluding that New York and New Jersey statutes effected a waiver of the Port Authority's Eleventh Amendment immunity.

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INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief.

STATEMENT

This brief addresses only the second question presented in the petition for a writ of certiorari, which relates to the standards for finding waivers of Eleventh Amendment immunity. The statement of the case therefore is limited to developments below that bear on that issue. While *amici* are directly affected by the rules governing waivers of immunity, we do not have a general interest in the precedent question whether particular entities are treated as "States" for Eleventh Amendment purposes. We therefore do not address the question whether the Port Authority should be permitted to claim Eleventh Amendment immunity in the first instance.

1. The Port Authority of New York and New Jersey (Port Authority) was created by an interstate compact entered into by the States of New York and New Jersey and approved by Congress in 1921. See 42 Stat. 174 (1921). The Port Authority has a variety of specified responsibilities, many of which it performs through its wholly owned subsidiary, petitioner Port Authority Trans-Hudson Corporation (PATH). See generally N.Y. Unconsol. L. § 6601 *et seq.* (McKinney 1979 & Supp. 1989); N.J.S.A. 32:1-1 - 35.50 (West 1979).

As originally enacted, the Compact made no provision for suits against the Port Authority. That was changed in 1950 and 1951, when New York and New Jersey, acting pursuant to the Compact's Article Seven,[1] respectively enacted reciprocal legislation "consent[ing] to suits, actions or proceedings of any form or nature at law, in equity or otherwise (including proceedings to enforce arbitration agreements) against the Port of New

[1] Article Seven provides that "[t]he port authority shall have such additional powers and duties as may hereafter be delegated or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other." N.Y. Unconsol. L. § 6408; N.J.S.A. 32:1-8.

York Authority." N.Y. Unconsol. L. § 7101; N.J.S.A. 32:1-157 (reprinted at Pet. App. A54). The Legislatures also imposed several limitations on this consent (see N.Y. Unconsol. L. §§ 7102-7105; N.J.S.A. 32:1-158 - 161), and enacted a venue provision which provides:

> The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district. The port authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings.

N.Y. Unconsol. L. § 7106; N.J.S.A. 32:1-162.

2. These consolidated cases involve separate actions brought in the United States District Court for the Southern District of New York against PATH by respondents, two PATH employees. Asserting claims under the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.*,[2] respondents argued that the Eleventh Amendment was not a bar to their actions because, among other things, New York and New Jersey were said to have waived the Port Authority's constitutional immunity against suit in federal court. Both district courts rejected that contention, holding that the Eleventh Amendment denied them jurisdiction over respondent's claims. Pet. App. A27-A44; A46-A50.

In rejecting respondent Feeney's waiver argument, the district court explained that "[w]aiver will be found only where it is stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable interpretation." Pet. App. A40. Here, the court found that the consent-

[2] Respondent Feeney also asserted claims under the Boiler Inspection Act, 45 U.S.C. § 22, and the Safety Appliance Act, 45 U.S.C. § 1. Pet. App. A28.

to-suit and venue provisions added to the Compact in 1951 do not speak with the requisite clarity, noting that "[t]he consent to suit provision of the Port Authority statute essentially empowers the Authority merely to sue and be sued." Pet. App. A40 (footnote omitted). That authorization "does not meet the 'unmistakably clear language' requirement because 'the Supreme Court has made it clear that the particular provision relied on must indicate the state's specific intention to be sued in federal court.'" Pet. App. A41 (citation omitted).

In rejecting respondent Foster's waiver argument, the second district judge agreed that the consent-to-suit provision "is insufficient to establish Eleventh Amendment waiver, since it does not specify an intention to permit suits in federal courts." Pet. App. A48. The court added that this omission was not remedied by the Compact's venue provision, explaining that

> [a]lthough the reason for the reference in [N.Y. Unconsol. L.] section 7106 to a federal judicial district is far from clear, it is clear that the legislature of New York knows how to consent to suit in federal court if that is its purpose. It is difficult to believe that it would have chosen the indirect and ambiguous language of section 7106 if its intention had been to waive the Port Authority's Eleventh Amendment immunity. Furthermore, an examination of the legislative history of this statute shows an intention only to waive sovereign immunity. The Eleventh Amendment was not addressed.

Pet. App. A49.

3. The court of appeals reversed. Writing in respondent Feeney's case (Pet. App. A8-A21), the court "acknowledge[d] that the standard for determining whether a state has waived its Eleventh Amendment immunity is strict." Pet. App. A16. But the court found that standard satisfied here, reading the Compact's venue provision to "expressly state[] that [suits against the Port Authority] may be brought in federal courts." Pet. App. A17. While the court of appeals "concede[d] that the statute's use of the term 'venue' is somewhat anomalous in the Eleventh Amendment context" (*ibid.*), the court added that the venue provision "is entirely meaningless" if it does not effect a waiver of Eleventh Amendment immunity. Pet. App. A18. The court of appeals also found support for its conclusion in the consent-to-suit provision's legislative history, which it read to express disapproval for a federal district court decision that had dismissed an action against the Port Authority on sovereign immunity grounds. Pet. App. A17. The court of appeals proceeded to reverse the district court's dismissal of respondent Foster's claim on the basis of its opinion in *Feeney*. Pet. App. A24-A25.

SUMMARY OF ARGUMENT

The Eleventh Amendment deprives federal courts of jurisdiction to entertain claims against a State except in two circumstances: when the State waives its immunity, or when Congress abrogates that immunity. This case involves the waiver prong of the immunity analysis. In such cases, the controlling rules are settled: a federal court will find a waiver of Eleventh Amendment protections only when the State's consent to suit is stated in express statutory language. It is not enough that the State has waived its immunity in general terms, or has waived sovereign immunity in its own courts. The State must, instead, have specified its intention to subject itself to suit in federal court. This rule assures that federal courts will not expand their jurisdiction—and thus disturb the constitutional balance between the Federal Government and the States—in the absence of unambiguous evidence that the State affirmatively considered the Eleventh Amendment issue in effecting a waiver of immunity.

The Port Authority Compact's consent-to-suit and venue provisions do not satisfy these strict waiver requirements. The consent-to-suit provision makes no mention of either the Eleventh Amendment or the possibility of suit in federal court; under this Court's precedents, the provision therefore cannot be deemed to waive the Port Authority's Eleventh Amendment protections. In coming to a contrary conclusion, the court below found evidence in the legislative history that the New York Legislature, in enacting the provision, intended to disapprove a federal district court decision that had dismissed an action against the Port Authority on sovereign immunity grounds. But legislative history generally should be irrelevant to the waiver inquiry. And in any event, the evidence relied upon by the court of appeals—the legislative history's inclusion of a single federal decision in a string citation of rulings that had accorded the Port Authority sovereign immunity—hardly evidences an unambiguous, considered decision to waive constitutional protections against suit in federal court.

The court below also found it probative that the Compact contains a provision laying venue in suits against the Port Authority "within a county or judicial district, established by one of said states or by the United States." But the placing of venue and the waiver of Eleventh Amendment immunity are two entirely different things. Absent waiver, the Eleventh Amendment deprives federal courts of subject matter jurisdiction to entertain claims against States. In contrast, "[v]enue provisions come into play only *after* jurisdiction has been established." *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 793 n.30 (1985) (emphasis added). This distinction between jurisdiction and venue—and this usage of the terms—was settled at the time of enactment of the Compact's consent-to-suit and venue provisions; there accordingly is no reason to believe that the Legislatures' choice of statutory language was anything but well-considered.

And while we frankly acknowledge that, whatever its meaning, the venue provision is not a model of clarity, a considered waiver of constitutional immunity surely requires something more than the inclusion of a reference to federal judicial districts in a venue clause.

ARGUMENT

THE PORT AUTHORITY'S ELEVENTH AMENDMENT IMMUNITY HAS BEEN NEITHER WAIVED NOR ABROGATED.

The rules that govern the resolution of this suit are clear and well settled. The Eleventh Amendment deprives the federal courts of jurisdiction to entertain claims against States except in two circumstances: where the States themselves have consented to suit, or where Congress has abrogated the States' constitutional immunity. In either case, the intent (on the part of the State or of Congress) to permit suit in federal court must have been expressed unambiguously in the text of the relevant statute. On the assumption that the Port Authority is a State for Eleventh Amendment purposes, this case turns on the waiver prong of immunity analysis; suits against the Port Authority may proceed in federal court only if New York and New Jersey, by enactment of the Compact's consent-to-suit and venue provisions, specifically intended to waive the Port Authority's Eleventh Amendment immunity. We do not understand the court of appeals to have disagreed with this approach. See Pet. App. A16. The court below went fatally wrong, however, in its application of the rule to the controlling statutory language.

A. Only Express Statutory Language Suffices To Waive Eleventh Amendment Immunity.

1. Although the Eleventh Amendment "deprives federal courts of any jurisdiction to entertain * * * claims" against unconsenting States (*Pennhurst State School and*

Hospital v. Halderman, 465 U.S. 89, 99 n.8 (1984)), this Court has long held that States may waive their constitutional immunity—that they may, in effect, vest jurisdiction in the federal courts.[3] Whether a State has done so in any given case, however, is a matter of state law. And rather than permit federal courts to guess at the meaning of ambiguous state statutes in this sensitive area of sovereign prerogative, the Court has set out a firm interpretive rule: federal courts may find a waiver "'only where stated "by the most express [statutory] language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction."'" *Florida Dept. of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149-150 (1981) (*per curiam*) (citations omitted). See *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-240 (1985); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909).

This insistence on an explicit waiver of Eleventh Amendment immunity in the text of the state statute—variously characterized by the Court as requiring "an unequivocal indication"[4] or a "clear declaration"[5] that the State intends to subject itself to suit in federal court—means that "a State does not waive Eleventh Amendment immunity in federal courts simply by waiving sovereign immunity in its own courts." *Welch v. Texas Dept. of*

[3] As Justice Marshall has noted, "as a rule, power to hear an action cannot be conferred on a federal court by consent. And, it may be that the recognized power of States to consent to the exercise of federal judicial power over them is anomalous in light of present-day concepts of federal jurisdiction. Yet, if this is the case, it is an anomaly that is well established as a part of our constitutional jurisprudence." *Employees v. Missouri Dept. of Public Health*, 411 U.S. 279, 294 n.10 (1973) (Marshall, J., concurring in the result).

[4] *Atascadero*, 473 U.S. at 238 n.1.

[5] *Pennhurst*, 465 U.S. at 99 n.9.

Highways and Public Transportation, 483 U.S. 468, 473-474 (1987) (plurality opinion).[6] Instead,

> [t]he test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one. Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment. * * * "[A] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." [*Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984)]. Thus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*.

Atascadero, 473 U.S. at 241 (emphasis in original) (citation omitted).[7]

2. The nature of the inquiry is not changed by the presence in this case of an interstate compact. In *Petty*

[6] See *Edelman*, 415 U.S. at 677 n.19; *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-579 (1946); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 465-466 (1945); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 172 (1909); *Smith v. Reeves*, 178 U.S. 436, 441-445 (1900).

[7] The Court's presumptive approach to Eleventh Amendment waivers is, in fact, in full accord with the treatment of sovereign immunity by the New York and New Jersey courts. See, *e.g.*, *Albany County Industrial Development Agency v. Gastinger Ries Walker Architects, Inc.*, 534 N.Y.S.2d 823, 825 (App. Div. 1988) ("sovereign immunity must be explicitly waived"); *Ashland Equities v. Clerk of New York County*, 493 N.Y.S.2d 133, 135 (App. Div. 1985); *Hunterfly Realty Corp. v. State*, 309 N.Y.S.2d 260, 263 (Sup. Ct. 1970) ("waivers of sovereign immunity must be strictly construed"); *Pinckney v. Jersey City*, 355 A.2d 214, 216 (N.J. Super. Ct. 1976) ("acts in derogation of sovereign immunity are to be strictly construed and * * * provisions which are conditions the sovereign attaches to the waiver of immunity are jurisdictional").

v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 278-279 (1959), the Court indicated that, where a waiver of immunity arises from the terms of a compact that has been enacted into law by Congress, the scope of the waiver may be determined as a matter of federal law. Here, however, the controlling consent-to-suit provision was not a part of the Port Authority Compact when it was approved by Congress in 1921. To the contrary, the provision was enacted 30 years later by the New York and New Jersey Legislatures pursuant to Article Seven of the Compact, which provides that "[t]he port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other." N.Y. Unconsol. L. § 6408; N.J.S.A. 32:1-8. Needless to say, "any suggestion that Congress actually considered the implications of its approval of the compact here on the Port Authority's eleventh amendment immunity would be an obvious fiction." *Leadbeater v. Port Authority Trans-Hudson Corp.*, 873 F.2d 45, 50 n.6 (3d Cir. 1989). In such circumstances, "when the alleged basis of waiver of the Eleventh Amendment's immunity is a state statute, the question to be answered is whether the State has intended to waive its immunity." *Petty*, 359 U.S. at 278.

In any event, even if the scope of the waiver here were thought to be a matter of federal law, the controlling interpretive rules would remain the same. Federal law makes clear, in the setting of suits against the United States, that the Court "must construe waivers strictly in favor of the sovereign, see *McMahon v. United States*, 342 U.S. 25, 27 (1951), and not enlarge the waiver '"beyond what the language requires,"' *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-686 (1983), quoting *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686 (1927)." *Library of Congress v. Shaw*, 478

U.S. 310, 318 (1986).[8] And in the particular context of the Eleventh Amendment, the Court—drawing directly from its decisions requiring that state waivers of immunity be express[9]—has held that, before Congress will be found to have overridden a State's immunity, "evidence of congressional intent must be both unequivocal and textual." *Dellmuth v. Muth*, 109 S.Ct. 2397, 2401 (1989). The "[l]egislative history generally will be irrelevant" to this inquiry (*ibid.*): "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero*, 473 U.S. at 242.[10]

3. These strict rules of construction are more than fastidiousness on the part of the Court; their use is dictated by a complex of considerations that relate to "the sensitive problems 'inherent in making one sovereign appear against its will in the courts of the other.'" *Welch*, 483 U.S. at 486-487 (plurality opinion), quoting *Employees v. Missouri Dept. of Public Health*, 411 U.S. 279, 293-294 (1973) (Marshall, J., concurring in the result). As we note above, the Eleventh Amendment is "an essential component of our constitutional structure" (*Dellmuth*, 109 S.Ct. at 2400) that imposes a textual limit on the jurisdiction of the federal courts; those courts are properly reluctant to expand that jurisdiction at the expense of the States—and thus disturb "the fundamental constitutional balance between the Federal Gov-

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[8] See, *e.g.*, *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Kubrick*, 444 U.S. 111, 117-118 (1979); *United States v. Sherwood*, 312 U.S. 584, 586, 590 (1941).

[9] See *Atascadero*, 473 U.S. at 240-241; *id.* at 253 n.5 (Brennan, J., dissenting); *Pennhurst*, 465 U.S. at 99.

[10] See *Welch*, 483 U.S. at 468, 473-474 (plurality opinion); *Quern v. Jordan*, 440 U.S. 332, 343-345 (1979); *Employees*, 411 U.S. at 282-283.

ernment and the States" (*Atascadero*, 473 U.S. at 238)—in the absence of an entirely unambiguous authorization from the States or from Congress.[11] And that reluctance should be compounded when, in assessing the scope of a waiver of immunity, federal judges are called upon to determine their jurisdiction by reference to state laws to which they cannot give authoritative interpretations.[12]

In this setting, the requirement of express statutory language to effectuate a waiver guarantees that the state legislature actually considered the issue and made an affirmative decision to waive the Eleventh Amendment immunity. At the same time, the requirement assures that a federal judge will not precipitate a constitutional confrontation by holding mistakenly that a State wished to subject itself to suit in federal court. Cf. *Welch*, 483 U.S. at 477-478 (plurality opinion). Indeed, the Court's requirement of unambiguous waiver has taken on independent significance by providing clear rules of decision against which state legislatures—including those that enacted the consent-to-suit clause at issue here—may act when setting the scope of their waivers of immunity. Cf. *Finley*, 109 S. Ct. 2003, 2008-2010 (1989).

In these circumstances, the Court's "'reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system.'" *Atascadero*, 473 U.S. at 242, quoting

[11] See *Welch*, 483 U.S. at 474-476 (plurality opinion); *Atascadero*, 473 U.S. at 242-243. Cf. *Finley v. United States*, 109 S.Ct. 2003, 2008-2009 (1989) (citation omitted) ("'Due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'"); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951).

[12] State courts are unlikely to have had occasion to provide guidance on the question whether state law authorizes suit in federal court.

Pennhurst, 465 U.S. at 99. "At first blush," as Justice Marshall has explained, "it may seem hypertechnical to say that these [respondents] are entitled personally to enforce their federal rights against the State in a state forum rather than in a federal forum. If that be so, I think it is a hypertechnicality that has long been understood to be a part of the tension inherent in our system of federalism." *Employees*, 411 U.S. at 298 (Marshall, J., concurring in the result).

B. The Controlling State Statutes Do Not Effect A Waiver of Eleventh Amendment Immunity.

1. Applying these rules here makes clear, in our view, that New York and New Jersey did not waive the Port Authority's Eleventh Amendment immunity. As an initial matter, the plain language of the Compact's consent-to-suit provision does not authorize suit in federal court. That provision, titled "[c]onsent to suits against the Port Authority," provides simply that "the states of New York and New Jersey consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise * * * against the Port of New York Authority." N.Y. Unconsol. L. § 7101; N.J.S.A. 32:1-157. The provision makes no mention of either the Eleventh Amendment or the possibility of suit in federal court; under this Court's decisions, the provision cannot be deemed to waive the Port Authority's Eleventh Amendment protections. See, *e.g.*, *Atascadero*, 473 U.S. at 241; *Kennecott*, 327 U.S. at 575 n.1, 575-577.

The court below did not take issue with this conclusion. Instead, its holding that a waiver had been effected rested on consideration of two factors other than the language of the consent-to-suit provision: the Compact's legislative history and its venue clause. But neither of these factors is a substitute for the requisite "unequivocal waiver specifically applicable to federal-court jurisdiction." *Atascadero*, 473 U.S. at 241.

As we note above, the Court has made clear that legislative history generally should not be considered in determining the existence of an Eleventh Amendment waiver. And the wisdom of that rule is well-illustrated by a look at the exceedingly slender evidence on which the court below relied in concluding that the States intended to waive the Port Authority's immunity. The sparse legislative history of the Port Authority consent-to-suit provision in fact makes no mention of the Eleventh Amendment, and nowhere suggests that the States specifically intended to set aside the Port Authority's federal court immunity; far from effecting an unlimited waiver, the history makes clear that "[t]he consent is limited by the usual conditions generally imposed upon suits against governmental bodies." 1950 New York State Legislative Annual (Leg. Ann.) 204.

In nevertheless finding support for an Eleventh Amendment waiver, the court of appeals concluded that the legislative history indicated an intent on the part of the Legislatures to overrule *Howell v. Port of New York Authority*, 34 F. Supp. 797 (D.N.J. 1940), a district court decision that dismissed an action against the Port Authority on sovereign immunity grounds. See Pet. App. A17. In fact, however, *Howell* was one of nine cases listed in the legislative history, as part of a string citation in a footnote, to establish the unexceptional proposition that the Port Authority had been held immune from suit in *any* court absent a waiver. Leg. Ann. 204 n.1. The States plainly could have sought to change that rule by setting aside the Port Authority's common law immunity against suit in state court without also authorizing suits in federal court. With this in mind, a single ambiguous citation in a footnote does not establish that the States affirmatively considered whether they wished to surrender their Eleventh Amendment immunity, and

certainly does not rise to the level of an unambiguous textual waiver.[13]

The court of appeals also relied (Pet. App. A16-A18) on the venue provision accompanying the Compact's consent-to-suit clause, which provides, in relevant part, that

> [t]he foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district. The port authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings.

N.Y. Unconsol. L. § 7106; N.J.S.A. 32:1-162. The court below itself recognized, however, that "use of the term 'venue' is somewhat anomalous in the Eleventh Amendment context." Pet. App. A17. In our view, this is a considerable understatement; in fact, the placing of venue and the waiver of Eleventh Amendment immunity are two entirely different things.

Absent waiver, the Eleventh Amendment "deprives federal courts of any jurisdiction to entertain * * * claims" against States (*Pennhurst*, 465 U.S. at 99 n.8); "Eleventh Amendment immunity 'partakes of the nature of a jurisdictional bar.'" *Welch*, 483 U.S. at 476 n.6 (plurality opinion), quoting *Edelman*, 415 U.S. at 678. It is for this reason—because the Amendment "'sets

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[13] An examination of *Howell* does nothing to alter this conclusion. The decision does not discuss the Eleventh Amendment in terms; it describes the sole question in the case as whether "the Port of New York Authority [is] a sovereign agency of the states of New York and New Jersey, immune from suit in the absence of express consent?" 34 F. Supp. at 798. The court's holding was that the Port Authority "performs governmental functions beyond state lines, and * * * is immune from suit without its consent." *Id.* at 801.

forth an explicit limitation on federal judicial power'" (*Pennhurst*, 465 U.S. at 99 n.8, quoting *Ford*, 323 U.S. at 467)—that an Eleventh Amendment claim may be asserted for the first time in this Court. See *Pennhurst*, 465 U.S. at 99 n.8; *Edelman*, 415 U.S. at 678. See generally *Nevada v. Hall*, 440 U.S. 410, 420-421 (1979); *Ex Parte New York, No. 1*, 256 U.S. 490, 497 (1921). A valid waiver of immunity therefore is necessary to vest the federal court with jurisdiction.

In contrast, "[v]enue provisions come into play only *after* jurisdiction has been established and concern 'the place where judicial authority may be exercised'; rather than relating to the power of a court, venue 'relates to the convenience of litigants and as such is subject to their disposition.'" *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 793 n.30 (1985) (emphasis added), quoting *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). See *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979); *Denver & R.G.W.R.R. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 559 (1967) ("Of course, venue for a suit against an unincorporated association becomes important only if the association is itself suable"). "This distinction between the court's power to adjudicate and the place where that authority may be exercised must always be recognized." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3801 at 5 (footnote omitted) (2d ed. 1986). The understanding of the distinction between jurisdiction and venue—and this usage of the terms—was settled at the time of enactment of the Compact's consent-to-suit and venue provisions. See, *e.g.*, *Neirbo*, 308 U.S. at 167-168.

There accordingly is no reason to suppose that the Legislatures' choice of statutory language was anything but well-considered. Indeed, the Compact's venue provision plainly was envisioned as a *limitation* on the separate waiver of immunity; referring to N.Y. Unconsol. L. § 7101 and N.J.S.A. 32:1-157, the venue provision provides that "[t]he foregoing consent [to suit] is granted upon the condition that venue" be laid in specified courts. It therefore is hardly likely that the venue provision was understood to operate as an affirmative grant of power to the federal courts. To the contrary, it would be perverse to hold that a provision designed to limit the waiver of immunity has the effect of authorizing an entirely new category of suits.

The court of appeals nevertheless concluded that the venue provision must amount to a waiver of Eleventh Amendment immunity, reasoning that the provision otherwise would be "entirely meaningless." Pet. App. A18. We frankly acknowledge that the purpose of the reference to federal judicial districts in the venue clause is obscure. Inclusion of the language may have been an effort, albeit an ineffective one, to define venue in suits where Congress already had abrogated the Port Authority's immunity.[14] But while it may be unclear what the provision does accomplish, it is entirely clear that laying venue in a particular district does not grant *jurisdiction* to courts located there. Thus, as Judge Seitz wrote for the Third Circuit in declining to find a waiver of the Port Authority's Eleventh Amendment immunity, "whatever the purposes of this part of [N.J.S.A.] Section 32:1-162, we think the Supreme Court, by requiring proof of consent by 'overwhelming implication,' mandates that there be much more than inclusion of a reference to a federal judicial district in a venue provision." *Leadbeater v. Port Authority Trans-Hudson Corp.*, 873 F.2d 45, 49 (3d Cir. 1989). That conclusion plainly was correct. However it is read, the venue provision is not a model of clarity; and where the meaning of a statute

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[14] As the court of appeals recognized (Pet. App. A18), venue in such actions would be determined by reference to federal statutes. See generally 15 C. Wright, A. Miller & E. Cooper, *supra*, § 3803 at 10-17.

claimed to set aside the Eleventh Amendment is in doubt, "imperfect confidence will not suffice given the special constitutional concerns in this area." *Dellmuth*, 109 S. Ct. at 2401-2402.

2. We add that the outcome here would be no different if this case were viewed as involving a question of congressional abrogation rather than state waiver of the Eleventh Amendment—in other words, if the controlling law were understood to be the congressional resolution approving the Port Authority Compact. The Court found that such a resolution overrode the Eleventh Amendment in *Petty*, where the compact approved by Congress contained a sue-and-be-sued clause and where the Compact language specifically reserved the powers of " 'any court of the United States.' " 359 U.S. at 281. In contrast, the Port Authority Compact did not contain a consent-to-suit provision at the time it was approved by Congress, and it makes no reference to the federal courts; the Compact provides only, in general terms, that it "shall not be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of such agreement." 42 Stat. 174, 177 (1921). It is plain that "this general language upon which Congress's approval of the interstate compact was conditioned" does not "speak[] with sufficient clarity to abrogate P.A.T.H.'s eleventh amendment immunity." *Leadbeater*, 873 F.2d at 50.[18]

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[18] Indeed, it is not at all clear, after the decision in *Dellmuth*, *Welch*, and *Atascadero*, that the language at issue in *Petty* would today be held to abrogate the Eleventh Amendment. See *Leadbeater*, 873 F.2d at 50. See generally *Edelman*, 415 U.S. at 672. Cf. *Welch*, 483 U.S. at 495 (White, J., concurring in the opinion and judgment).

CONCLUSION

If the Court answers the first question presented in the petition for a writ of certiorari by holding that the Port Authority should be treated as a State for Eleventh Amendment purposes, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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December 14, 1989

(5)

No. 89-386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Petitioner,

— VS. —

PATRICK FEENEY,
Respondent.

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Petitioner,

— VS. —

CHARLES T. FOSTER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF PAN AMERICAN WORLD AIRWAYS, INC., UNITED STATES AVIATION UNDERWRITERS, INC. AND UNITED STATES AVIATION INSURANCE GROUP FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Pan American World Airways, Inc. ("Pan Am"), United States Aviation Underwriters, Inc. ("USAU") and United States Aviation Insurance Group ("USAIG") hereby respectfully move, pursuant to Rule 37 of the Rules of this Court, for leave to file the attached brief as *amici curiae* in support of Respondents. The consent of the attorney representing Respondents has been obtained. The consent of the attorney representing Petitioner was requested but refused.

The interest of Pan Am, USAU and USAIG in these cases arises from the fact that Pan Am is a plaintiff, and USAU and USAIG were third-party defendants, prior to the granting of their motion for summary judgment, in a case pending in the United States District Court for the Eastern District of New York in which the same issue is before the court. *Pan American World Airways, Inc. v. The Port Authority of New York and New Jersey, et al.*, 86 CV 0938 (JMcL) (McLaughlin, J.). In that case, the Port Authority sought a remand to state court of that portion of the action that sought recovery against it, asserting that the Port Authority is immune from suit in the federal courts under the Eleventh Amendment to the United States Constitution. In this case, the Court is called on to decide whether the Port Authority, through Petitioner, the Port Authority's wholly owned subsidiary, is entitled to immunity from suit in federal court pursuant to the Eleventh Amendment to the United States Constitution.

In the appellate court below, Respondents argued primarily that the Federal Employers Liability Act created an exception to Eleventh Amendment immunity that Petitioner would otherwise have enjoyed. The constitutional issue raised before this Court, whether the Port Authority is entitled to Eleventh Amendment immunity in the first instance, was raised in the court of appeals by Pan Am, USAU and USAIG, through the filing of a brief *amici curiae*. That issue was not raised or discussed by Respondents.

Because Respondents may pursue the same arguments in this Court that they advanced in the court of appeals, it is believed that the brief that *amici curiae* are requesting leave to file will contain more complete argument on the constitutional issue. In addition, if the analysis advanced by *amici curiae* is accepted, it will be dispositive of the jurisdictional motion by the Port Authority in the above-mentioned action pending in the United States District Court for the Eastern District of New York.

Moreover, Pan Am and other airlines are, and for the foreseeable future will be, captive lessees of space and facilities from the Port Authority at John F. Kennedy, Newark and

LaGuardia International Airports. All airlines, including Pan Am, and their insurers have a profound interest in the procedures, discovery mechanisms and fora available to them in resolving current and future disputes with their landlord, the Port Authority.

In short, *amici* are not only directly affected by the instant case, because of the action in the Eastern District of New York, but also have a broader interest than that of Respondents in the outcome of these cases.

Accordingly, Pan Am, USAU and USAIG respectfully request that their motion for leave to file a brief *amici curiae* be granted, and that the brief annexed hereto be received by the Court.

January 12, 1990

Respectfully submitted,

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INTEREST OF PAN AMERICAN WORLD AIRWAYS, INC., UNITED STATES AVIATION UNDERWRITERS, INC. AND UNITED STATES AVIATION INSURANCE GROUP AS *AMICI CURIAE*

Pan American World Airways, Inc. ("Pan Am") is a plaintiff, and United States Aviation Underwriters, Inc. ("USAU") and United States Aviation Insurance Group ("USAIG") were third-party defendants that were granted summary judgment, in an action pending against The Port Authority of New York and New Jersey ("Port Authority") in the United States District Court for the Eastern District of New York, 86 CV 0938 (JMcL) (McLaughlin, J.). The Port Authority moved to remand that portion of the action directed against it to state court on the ground that it is a "State" for Eleventh Amendment purposes and therefore entitled to immunity from suit in federal court. The district court denied that motion and placed the case on its trial calendar, ruling that the unanimous opinion of the Second Circuit Court of Appeals below in this case, holding that the Port Authority is not entitled to immunity under the Eleventh Amendment, *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir.), *cert. granted*, 110 S. Ct. 320 (1989), was "both binding on this Court and dispositive of the issues raised in the instant motion." When this Court granted certiorari in these cases, Judge McLaughlin removed Pan Am's action from the trial calendar pending this Court's decision.

Pan Am, USAU and USAIG hold an evident interest in the outcome of the cases before this Court. Indeed, should this Court decide that the Port Authority is not entitled to immunity from suit in federal court under the Eleventh Amendment, the district court's jurisdiction over Pan Am's action against the Port Authority will be unassailable, thus preserving over two years of extensive discovery, pre-trial hearings and the district court's decision granting summary judgment in favor of USAU and USAIG[1] As parties in a pending action having interests that may be

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[1] In the action pending in the Eastern District of New York, Pan Am also opposed the Port Authority's motion seeking remand on the ground that, even

(Footnote continued)

directly and materially infringed by a decision of this Court holding the Port Authority, and derivatively PATH, to be a "State" entitled to immunity under the Eleventh Amendment, Pan Am, USAU and USAIG have a substantial interest in the outcome of the instant action.

Moreover, as captive lessees of space and facilities from the Port Authority at John F. Kennedy, Newark and LaGuardia International Airports, for the foreseeable future, Pan Am and its fellow airline lessees have a profound interest in the procedures, discovery mechanisms and venues available to them in resolving current and future disputes with their landlord, the Port Authority.

Finally, it was *amici* and not Respondents who raised the fundamental constitutional issues upon which the Second Circuit Court of Appeals based its decision and that are now before this Court. It is those constitutional issues that the Court must consider here.

SUMMARY OF ARGUMENT

The Eleventh Amendment, by its plain language, provides immunity from suit in federal court only to "one of the United States." In construing the Amendment's limited language, this Court has established a stringent test to determine if a bi-state entity created by compact, such as the Port Authority,[2] may claim such immunity: the enabling legislation creating the entity must show that the compacting states intended to confer such immunity upon the entity, with Congressional concurrence. Analysis of the pertinent legislation here discloses no such intent. To the contrary, the legislation's description of the Port Authority as the "municipal corporate instrumentality of the

---

if it were determined to be entitled to immunity under the Eleventh Amendment, the Port Authority waived any such immunity by actively litigating the case for over two years and seeking affirmative relief from the court. That issue was not reached by the district court and is not addressed here.

[2] Because Petitioner PATH is a wholly owned subsidiary of the Port Authority, it is entitled to immunity only derivatively, upon a finding that the Port Authority is so entitled. Further references in this brief to the "Port Authority" are intended to be inclusive of its subsidiary, Petitioner PATH.

two states," its express limitation that the Port Authority "shall have no power to pledge the credit of either state or to impose any obligation upon either state" and the explicit statutory provision for venue in actions against the Port Authority in "a judicial district, established by one of said states or by the United States" demonstrates that New York and New Jersey did not intend to confer Eleventh Amendment immunity on the Port Authority. This absence of intent is further confirmed by the Port Authority's prior recognition that it is subject to suit in the federal courts, as evidenced by the fact that the Port Authority litigated in the federal courts for over four decades without raising any Eleventh Amendment immunity claim and without legislative interference; the State of New York's resort to litigation against the Port Authority; New York's and New Jersey's retention of the exclusive statutory right to sue the Port Authority for injunctive relief; and, most significantly, the legislatures' statutory insulation of the respective state treasuries from adverse judgments against the Port Authority. In considering these factors and applying this Court's test for analyzing the status of a bi-state entity for Eleventh Amendment purposes, the appellate court below properly held that the Port Authority is not cloaked with immunity.

This Court has held that where an entity other than a state seeks to avail itself of immunity under the Eleventh Amendment, the most critical inquiry is whether the suit seeks to "impose a liability which must be paid from public funds in the state treasury." The judgment sought in each case before this Court will have, and can have, no impact on the treasury of New York or of New Jersey. Indeed, review of the enabling legislation demonstrates that the standard articulated by this Court, that a judgment "must be paid from public funds in the state treasury," cannot be met here. Thus, it is evident that the Port Authority is not immune from suit in the federal courts.

Cases holding that Eleventh Amendment immunity extends to the Port Authority were, put simply, wrongly decided. The most important of those cases is the Third Circuit's decision in *Port Authority Police Benevolent Association v. Port Authority*

of New York and New Jersey, 819 F.2d 413 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987), upon which Petitioner substantially relies here. In that case, an action seeking injunctive relief and not money damages, the Third Circuit misapplied this Court's test for determining whether a bi-state entity is a "State" for Eleventh Amendment immunity purposes, wrongly considering a hypothetical judgment's potential, indirect impact on the states' treasuries. When this Court's test is properly applied, as it was in the Second Circuit's decision below, it is manifest that the Port Authority is not entitled to invoke the immunity provided to "one of the United States" under the Eleventh Amendment. Accordingly, the decision below should be affirmed.

ARGUMENT

THE PORT AUTHORITY IS NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. This not only bars suits against a state in federal court but also suits where, although not a named party, the state is the real party in interest. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); 13 C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* § 3524 (2d ed. 1984). Thus, where an action is brought against an agency or department of a state, Eleventh Amendment immunity applies. *E.g., Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100 (1984).

More difficult is determining whether there is Eleventh Amendment immunity when the defendant is neither a state nor a state agency or department. In such a case, the pivotal inquiry is whether the judgment sought will be paid out of the

state treasury. *Edelman v. Jordan*, 415 U.S. 651, 663; *see also Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 at 400-01 (1979). Moreover, when the defendant is a bi-state entity, such as the Port Authority, Eleventh Amendment immunity will only apply if the legislation creating it establishes that the compacting states intended to confer such immunity and Congress concurred in that determination. Because New York and New Jersey did not intend to confer such immunity on the Port Authority, and because judgments in *Feeney* and *Foster* will not be paid out of the state treasury of New York or of New Jersey, the Port Authority is not entitled to Eleventh Amendment immunity.

A. There is Insufficient Evidence Of Intent To Cloak The Port Authority, Or Derivatively PATH, With Eleventh Amendment Immunity.

The analysis of whether a bi-state entity, like the Port Authority, is entitled to invoke Eleventh Amendment immunity begins with this Court's decision in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391. There, the Court considered whether the Tahoe Regional Planning Agency ("TRPA"), an entity created by compact between the States of California and Nevada to coordinate and regulate development in the Lake Tahoe basin, was entitled to Eleventh Amendment immunity. The action against the TRPA sought monetary damages and equitable relief.

This Court rejected the Ninth Circuit's "expansive reading of the Eleventh Amendment" and reversed the finding that the TRPA was entitled to Eleventh Amendment immunity. *Id.* at 396. The Court wrote:

> By its terms, the protection afforded by that Amendment is only available to "one of the United States." It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the

> Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power."

Id. at 400-01 (footnote omitted).

Further, this Court held that an entity created by compact, such as the Port Authority, would not be entitled to Eleventh Amendment immunity absent evidence showing that the compacting states intended to confer such immunity, stating:

> Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the [Eleventh] Amendment.

Id. at 401. An examination of the pertinent legislation and operations of the TRPA compelled the conclusion that the states did not intend to extend Eleventh Amendment immunity to it. *Id.* at 401-02.

This Court's decision in *Lake Country Estates* imposes a rigorous test that a bi-state entity must satisfy before it can successfully claim Eleventh Amendment immunity. When applied to the Port Authority, that test compels the conclusion that the compacting states did not intend to cloak the Port Authority with such immunity.

A review of the statutes creating and structuring the Port Authority reveals no legislative intent to confer immunity. *See* N.Y. Unconsol. Law § 6401 *et seq.* (McKinney 1979); N.J.S.A. 32:1-1 *et seq.* (West 1963). In fact, such review indicates the directly contrary intent.

The Port Authority was created by a bi-state compact entered into in 1921 and approved by Congress. The statutes creating

the Port Authority describe the entity as "the municipal corporate instrumentality of the two states" and "a body corporate and politic." N.Y. Unconsol. Law §§ 6459, 6404 (McKinney 1979). The Port Authority is empowered to "purchase, construct, lease and/or operate any terminal or transportation facility" within its geographic authority. *Id.* § 6407. It is further authorized to borrow money in its own name and to secure such debts through the issuance of bonds or the mortgaging of its own properties. *Id.* The Port Authority is barred from pledging the credit of either state, *id.* § 6408, and has "no power to pledge the credit of either state or to impose any obligation upon either state, or upon any municipality," *id.* § 6459.

From these provisions alone, it is clear that "the States [did not structure the Port Authority] to enable it to enjoy the special constitutional protection of the States themselves." *Lake Country Estates*, 400 U.S. at 401. To the contrary, the states created an independent entity, analogous to a county, municipality or "municipal corporate instrumentality."

The conclusion derived from legislation concerning the Port Authority is that the states intended that the Port Authority would be subject to suit in federal court. Generally, the applicable statutes provide that the Port Authority may sue and be sued. *See* N.Y. Unconsol. Law § 7101 *et seq.* (McKinney 1979) and N.J.S.A. § 32:1-157 (West 1963). These statutes nowhere expressly provide or suggest that such suits may not be brought in federal court. In fact, in the venue provision, the states consented to federal court jurisdiction over the Port Authority by providing:

> The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a *judicial district, established by one of said states or by the United States*, and situated wholly or partially within the port of New York district.... Although the port authority is engaged in the performance of governmental functions, *the said two states consent to liability on the part of the port authority*

> *in such suits, actions or proceedings* for tortious acts committed by it and its agents to the same extent as though it were a private corporation.

N.Y. Unconsol. Law § 7106 (McKinney 1979) (emphasis added). *See, also*, N.J.S.A. § 32:1-171 (West 1963). The reference to venue in a "judicial district, established by . . . the United States" clearly refers to actions brought in federal court.

In addition, the Port Authority has participated in litigation in the federal courts for over four decades, as plaintiff, defendant or intervenor. The Port Authority and its agents and affiliates are identified as plaintiffs, defendants or intervenors in over one hundred citations to decisions rendered in the federal courts during that period. At least until *Port Authority Police*, the first case we have found in which the Port Authority argued that it was a "State" immune from suit in federal court under the Eleventh Amendment, the Port Authority apparently did not dispute that it was subject to suit in federal court.

Moreover, the Port Authority's newly adopted strategy of asserting Eleventh Amendment immunity appears to be exercised most selectively. As noted above, the Port Authority actively litigated with Pan Am, USAU and USAIG for over two years, through the completion of discovery and the filing of a pre-trial order. Only after receiving an adverse decision on a motion for partial summary judgment on a key issue in the case did it raise, for the first time, a claim of Eleventh Amendment immunity. Conversely, over four months after vigorously arguing to the Second Circuit Court of Appeals that it was immune from suit in federal court in the instant action, the Port Authority urged the same court, in an unrelated case, to affirm a decision favorable to it on the merits, apparently without raising any claim of immunity. *Automobile Club of New York v. The Port Authority of New York and New Jersey*, 887 F.2d 417 (2d Cir. 1989).

Significantly, even though the Port Authority has repeatedly participated in suits in federal court, New York and New Jersey never objected. The states would have simply had to adopt

legislation providing that the Port Authority's consent to be sued, N.Y. Unconsol. Law § 7101 (McKinney 1979) and N.J.S.A. § 32:1-157 (West 1963), only extended to actions brought in state court. Neither state passed such legislation.

Had New York and New Jersey wished to confer Eleventh Amendment immunity on the Port Authority, they surely were aware of what would be needed to do so. For example, legislation in New York relating to another bi-state entity, the Tri-State Regional Planning Authority, expressly provides that the authority will:

> enjoy the sovereign immunity of the party states and may not be sued in any court or tribunal whatsoever.

N.Y. Unconsol. Law § 8311 (McKinney 1979). Although that language also deals with the related concept of sovereign immunity, it has been held to provide the Tri-State Regional Planning Authority with Eleventh Amendment immunity because it meets the *Lake Country Estates* requirement that the compacting states "structured" the entity to enjoy the constitutional protection enjoyed by the states. *Council of Commuter Organizations v. Metropolitan Transportation Authority*, 683 F.2d 663, 672 (2d Cir. 1982). It is thus clear that when New York intends to extend immunity to a bi-state entity, it knows how to do so in unequivocal language.

Finally, in deciding whether a bi-state entity has immunity, this Court looks to the past relationship between the state and the entity. As Petitioner concedes in its brief, whether the states have ever resorted to litigation against the entity (undeniably a telling demonstration of a creator's view as to its own intent) is a key factor in determining the entity's status for Eleventh Amendment purposes:

> Indeed, this Court was particularly impressed by the fact that the TRPA was so independent of State control that one of the Compacting States, California, had "resorted to litigation in an unsuccessful attempt to impose its will" on the agency.

Petitioner's brief at 10 (quoting *Lake Country Estates*, 440 U.S. at 402). Applying this standard, it cannot seriously be argued that New York considers the Port Authority to be a state agency since it has resorted to litigation against it. *See New York v. Port Authority of New York and New Jersey*, 64 Misc. 2d 563, 315 N.Y.S.2d 9 (Sup. Ct. N.Y. County 1970). Moreover, the creating states have retained the exclusive statutory right to sue the Port Authority for injunctive relief. N.Y. Unconsol. Law § 7105 (McKinney 1979) and N.J.S.A. § 32:1-161 (West 1963). It is inconceivable that either New York or New Jersey would have formally adopted and retained a statutory right to sue itself.

B. Neither The Port Authority Nor PATH Is Entitled To Eleventh Amendment Immunity Because A Civil Judgment Against Either Entity Will Not Impact On A State Treasury.

Even assuming that New York and New Jersey intended to confer Eleventh Amendment immunity on the Port Authority, that immunity would not apply on the facts of the instant cases. In determining whether an entity other than the state itself is entitled to immunity in a particular case, a federal court may consider a number of criteria, but the key factor is whether a judgment in the action will be satisfied from the state treasury. *Edelman v. Jordan*, 415 U.S. at 663.

In *Trotman v. Palisades Interstate Park Commission*, 557 F.2d 35 (2d Cir. 1977), the Second Circuit Court of Appeals considered whether the Park Commission, a bi-state entity created by compact, had Eleventh Amendment immunity and stated:

> While there are many factors which must be considered in determining whether a state instrumentality can raise the bar of the Eleventh Amendment in a particular suit, the most significant is whether any liability against the agency must be paid from public funds in the state treasury. . . .
>
> . . . We believe that if the nature and effect of a suit against the Commission would be to impose a liability which *must* be paid from public funds in the state treasury of one of the signatory states, then that suit is barred by the Eleventh Amendment.

557 F.2d at 38 (footnote omitted) (emphasis added). The court concluded that the action was actually against the State of New York because the Park Commission would have to satisfy any judgment out of appropriations made by that state's legislature which must be paid from the state's treasury. *See also Ram Ditta v. Maryland National Capital Parks and Planning Commission*, 822 F.2d 456, 457 (4th Cir. 1987) ("in determining whether an entity is the *alter ego* of the state, it is generally held that the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded"); *Fay v. South Colonie Central School District*, 802 F.2d 21, 27 (2d Cir. 1986) (school district not entitled to assert Eleventh Amendment immunity because it "has not established that payment of money damages to [plaintiff] will come directly from the state treasury"); *Jones v. Smith*, 784 F.2d 149, 152 (2d Cir. 1986) (claim against state official barred by Eleventh Amendment as the State would have to pay any damages awarded); *Dwyer v. Regan*, 777 F.2d 825, 835-36 (2d Cir. 1985) (that portion of action seeking an award of back pay from employing agency barred by Eleventh Amendment because it would "necessarily have to be satisfied from State funds"), *modified*, 793 F.2d 457 (2d Cir. 1986); *see generally*, 13 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 3524 at 129 (2d ed. 1984).

The judgment sought in the cases before this Court, *Feeney* and *Foster*, will have no impact on the treasury of either New York or New Jersey. There is nothing to indicate that PATH itself will be unable to pay the judgments. Moreover, even if PATH could not satisfy the judgments, its parent, the Port Authority, has more than adequate resources to do so. The Port Authority is a self-sustaining entity, funding its operations from the revenues it generates. It describes itself as follows:

> Unlike many other authorities and governmental agencies, the Port Authority, by law, must be self-supporting. It has neither the power to tax nor the

> right to pledge the credit of either state in support of its general obligations.
>
> The Port Authority pays its own way for operations and capital investment, pooling revenues earned from its facilities through rents, fees, fares, tolls and other user charges. It finances new construction, major improvements and repairs by selling its bonds and other obligations.

Comprehensive Annual Financial Report of the Port Authority of New York and New Jersey for the Year Ended December 31, 1987, 10; *see also* N.Y. Unconsol. Law § 7002 (McKinney 1979). By law, the Port Authority can only seek funding for operations from the state legislatures if "revenues from operations conducted by the Port Authority are [not] adequate to meet all expenditures." N.Y. Unconsol. Law § 6416 (McKinney 1979). Moreover, such funding is statutorily restricted to "salaries, office and other administrative expenses," may only be provided upon approval of the respective governors and may not exceed "one hundred thousand dollars in any one year." *Id.*

At year end 1987, for example, the Port Authority's General Reserve Fund balance was $293,249,000. *See Comprehensive Annual Financial Report*, 30-31, 51. This far exceeds the combined judgments sought in the instant cases. But even if the funds proved insufficient, the authorizing statutes themselves preclude resort to the states' treasuries for satisfaction of civil judgments. N.Y. Unconsol. Law § 6416 (McKinney 1979).

C. The Third Circuit's Holding In *Port Authority Police* Rests On A Flawed Eleventh Amendment Analysis.

In support of its Eleventh Amendment claim, Petitioner relies heavily on the decision of the United States Court of Appeals for the Third Circuit in *Port Authority Police*, 819 F.2d 413, an action seeking injunctive relief and not money damages, where the court extended Eleventh Amendment immunity to the Port Authority. The decision, however, rests on a flawed Eleventh Amendment analysis.

In *Port Authority Police*, the court examined the status of the Port Authority for Eleventh Amendment purposes against the backdrop of this Court's decision in *Lake Country Estates*, 440 U.S. 391. In finding the Port Authority immune from suit, the Third Circuit focused exclusively on the individual factors set out in *Lake Country Estates* but failed to consider the overarching inquiry, whether the compacting states intended to confer Eleventh Amendment immunity on the Port Authority.

As noted above, the pivotal inquiry is whether an adverse judgment will be paid out of the state treasury. The Third Circuit reasoned that if a hypothetical judgment against the Port Authority was "serious enough to deplete its resources, the Authority would be able to go to the state legislatures in order to recoup the amount needed for its operating expenses." *Port Authority Police*, 819 F.2d at 416. As demonstrated by the relevant statutory language set forth above, this conclusion is ill-founded because the states' obligation to fund the Port Authority's operations is restricted by statute, and does not include an obligation to fund the payment of judgments.

Further, because the plaintiffs in *Port Authority Police* sought injunctive relief only, the court relied on a hypothetical "serious" judgment that would be paid out of the state treasury to the extent that it exceeded the Port Authority's own resources. The proper analysis, at least where the action seeks money damages, as in the cases at bar, is whether a judgment in a given suit would "impose a liability which *must* be paid from public funds in the state treasury." *Trotman*, 557 F.2d at 38 (emphasis added).[3]

The issue of whether a money judgment must be paid from state funds to cloak a government defendant with Eleventh Amendment immunity was the focus of the decision in *Travelers Indemnity Company v. School Board of Dade County, Florida*,

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[3] To the extent that the reasoning in *Port Authority Police* is based on the proposition that a judgment could have an indirect effect on the state treasury because the Port Authority might have to seek additional funding from the states if it encountered a shortfall after paying a sizeable judgment, it is simply

(Footnote continued)

666 F.2d 505 (11th Cir.), *cert. denied*, 459 U.S. 834 (1982). There, a surety on a performance bond, who had arranged for the completion of a construction project contracted for by the county school board, sought damages from the board. The board argued that it had obtained state funds for the construction contract and that those funds would be used to satisfy any judgment taken against the board. It contended that it was an arm of the state entitled to Eleventh Amendment immunity in that particular case. The Eleventh Circuit disagreed, stating:

> *Edelman* makes it clear that the Eleventh Amendment protection is available only if satisfaction of the judgment sought against the state "agency" *must* under all circumstances, be paid out of state funds. As we have already indicated, there is no contention, and no facts to support such a contention, if made, that there is any prohibition by state law or constitution that would prevent the county board of education from satisfying a judgment in this lawsuit out of county funds not in any way derived from the state of Florida.

Id. at 509 (emphasis in original).

This conclusion was echoed in *Jacintoport Corp. v. Greater Baton Rouge Port Commission*, 762 F.2d 435 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986). There, the plaintiff sought injunctive relief or, in the alternative, money damages from the Port Commission. The district court held that the Port Commission was entitled to Eleventh Amendment immunity. The Fifth Circuit reversed, principally on the ground that the Port Commission was financially independent of the state, noting that "[t]he purpose of the immunity therefore largely disappears when a judgment against the entity does not entail a judgment against the state." 762 F.2d at 440. The court then observed:

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wrong. The fact that an action may have an indirect effect on the state treasury is irrelevant to Eleventh Amendment analysis. *See, e.g., Finkielstain v. Seidel*, 692 F. Supp. 1497, 1506-07 (S.D.N.Y.), *aff'd in part and rev'd in part*, 857 F.2d 893 (2d Cir. 1988).

> On the record before us, it appears that any judgment obtained by Jacintoport can be satisfied by the Commission itself.... That record shows that even the most favorable estimation of Jacintoport's monetary damages does not reach a tenth of the Commission's surplus revenue in a "good year" – of which it has had several recently. The State of Louisiana will not incur liability on this judgment's account. We specifically decline to reach the question of this Commission's immunity in an instance where the size and nature of the judgment sought would clearly result in liability for the state.

Id. at 441. *See also Zeidner v. Wulforst*, 197 F. Supp. 23 (E.D.N.Y. 1961); *Levitt v. State of Maryland Deposit Insurance Fund Corp.*, 643 F. Supp. 1485, 1489-91 (E.D.N.Y. 1986).

As the foregoing cases make clear, the state is only the real party in interest for Eleventh Amendment purposes if the money judgment sought against the government entity must be paid directly from the state coffers. In *Port Authority Police*, the court misapplied this analysis by positing an unlikely, hypothetical money judgment, not even at issue there, to support its holding. Based on the foregoing, *amici* respectfully submit that when the Court's test is properly applied, the Port Authority is not entitled to Eleventh Amendment immunity.

CONCLUSION

The Port Authority is not immune from suit in federal court under the Eleventh Amendment because the legislatures of the states that created it did not intend to confer such immunity, and because a judgment in the cases presently before this Court will have no impact on the treasuries of New York or New Jersey. Accordingly, the order of the Second Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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MOTION FILED
JAN 6 1990

No. 89-386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Petitioner,
—v.—
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Respondent.

PORT AUTHORITY TRANS-HUDSON CORPORATION,
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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE*

American Airlines, Inc. ("American"), Compagnie Nationale Air France ("Air France"), Deutsche Lufthansa A.G. ("Lufthansa"), Finnair Oy ("Finnair"), Iberia, Lineas Aereas De Espana S.A. ("Iberia"), Japan Air Lines Co., Ltd. ("JAL"), Koninklijke Luchtvaart Maatschappij, N.V.-KLM Royal Dutch Airlines ("KLM") and Swiss Air Transport Co.,

Ltd. ("Swissair") respectfully move to file the attached Brief *amici curiae* in this case. The consent of counsel for Respondents has been obtained. The consent of counsel for Petitioner has been requested but was refused.

The interest of American, Air France, Lufthansa, Finnair, Iberia, JAL, KLM and Swissair in this case stems from the fact that each is an airline that occupies and uses facilities at airports owned or operated by the Port Authority of New York and New Jersey ("Port Authority"), Petitioner's parent corporation, pursuant to a written contract or contracts between the Port Authority and the respective airlines for the purpose of engaging in air commerce of the United States. Among those airports is John F. Kennedy International Airport ("JFK"), formerly Idlewild International Airport and New York International Airport.

In legislation enacted by the States of New York and New Jersey, the Port Authority consented to suit against it by scheduled airlines upon any written contract for the use or occupancy of space, premises or facilities at New York International Airport, now JFK. The language of the statutory consent to suit is substantially similar to the language presented to the Court for review in this case. *Compare* N.Y. UNCONSOL. LAWS §§ 7101-12 (McKinney 1979) *and* N.J. STAT. ANN. §§ 32:1-159 to 32:1-168 (West 1983) *with* N.Y. UNCONSOL. LAWS §§ 7131-36 (McKinney 1979) *and* N.J. STAT. ANN. §§ 32:1-169 to 32:1-174 (West 1983). Each *amicus curiae* is interested in the proper interpretation of the substantially similar statutory consent to suit language applicable to written contracts between scheduled airlines and the Port Authority for the occupancy or use of space and facilities at JFK International Airport.

Moreover, it is the position of *amici* that the differences between the language in the consent to suit under review in this case and language in the consent to suit referring specifically to written contracts with the Port Authority are relevant to the proper interpretation of the statutory consent to suit under review and the disposition of this case. Neither the Petitioner

nor Respondents have adequately addressed those differences and their relevance to the issues presently before the Court.

The interest and position of the *amici curiae* are set forth more fully in their Brief attached to this motion.

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Dated: January 16, 1990

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

American Airlines, Inc. ("American"), Compagnie Nationale Air France ("Air France"), Deutsche Lufthansa A.G. ("Lufthansa"), Finnair Oy ("Finnair"), Iberia, Lineas Aereas De Espana S.A. ("Iberia"), Japan Air Lines Co., Ltd. ("JAL"), Koninklijke Luchtvaart Maatschappij, N.V.-KLM Royal Dutch Airlines ("KLM") and Swiss Air Transport Co.,

Ltd. ("Swissair") respectfully submit this Brief *amici curiae* in support of Respondents Patrick Feeney and Charles T. Foster for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit with respect to its decision in *Feeney v. Port Authority Trans-Hudson Corporation*, 873 F.2d 628 (2d Cir. 1989), *cert. granted*, ____ U.S. ____, 110 S. Ct. 320 (1989).

THE INTEREST OF *AMICI CURIAE*

Each of the *amici curiae* is an air carrier or a foreign air carrier as defined by Section 101(3) and Section 101(22) of the Federal Aviation Act of 1958 ("FAA Act"), 49 U.S.C.A. §§ 1301(3), 1301(22) (1976 & Supp. 1989), engaged in foreign, interstate or overseas air transportation as defined by the FAA Act. Each of the *amici curiae* is also an airline designated by the respective countries of which they are a national to perform air transport services under the applicable bilateral air services agreement. *See, e.g.*, Protocol Relating to the United States of America-Federal Republic of Germany Air Transport Agreement of 1955, November 1, 1978, United States-Germany, art. 2, 30 U.S.T. 7323, 7325-26, T.I.A.S. 9591. Air France, Lufthansa, Finnair, Iberia and Swissair are each also an "agency or instrumentality" of a foreign state and a "foreign state" as defined by the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C.A. § 1603 (Supp. 1989).

Each *amicus curiae* operates scheduled airline flights to and from the United States, including John F. Kennedy International Airport ("JFK"), thus engaging in air commerce of the United States. The regime under which air commerce is conducted is generally governed by multilateral international agreements, *e.g.*, Convention on International Civil Aviation, December 7, 1944, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295 ("Chicago Convention"), bilateral international agreements, *e.g.*, Protocol Relating to the United States of America-Federal Republic of Germany Air Transport Agreement of 1955, November 1, 1978, United States-Germany, 30 U.S.T.

7323, T.I.A.S. 9591, and Federal law, *e.g.*, FAA Act, 49 U.S.C.A. § 1301 *et seq.* (1976 & Supp. 1989).

Airports, including JFK, are obviously an essential part of air commerce. Their activities are also governed in part by multilateral international agreements, *e.g.*, the Chicago Convention, and Federal law, *e.g.*, the FAA Act, the Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C.A. §§ 2101-25 (Supp. 1989) and the Airport and Airway Improvement Act of 1982, 49 U.S.C.A. §§ 2201-27 (Supp. 1989). All airlines, including scheduled airlines such as *amici curiae*, are extremely interested in nondiscriminatory treatment by the owners and operators of the airports into and out of which they fly, including JFK. Occasionally, significant disputes arise with airport operators, including the Port Authority of New York and New Jersey ("Port Authority"), Petitioner's parent, over the proper interpretation and application of Federal law securing nondiscriminatory treatment for national and international airlines. *See, e.g., Global International Airways Corp. v. Port Authority*, 727 F.2d 246 (2d Cir. 1984); *British Airways Board v. Port Authority*, 558 F.2d 75 (2d Cir. 1977).

All airlines, and particularly *amici curiae*, have an interest in seeing that any dispute with an airport operator, such as the Port Authority, over the proper interpretation or application of Federal law, bilateral or multilateral international agreements, can be presented to Federal courts for interpretation rather than to various State courts throughout the country. In addition, those *amici curiae* which are foreign states as defined by the FSIA believe they are entitled to have such disputes submitted to Federal courts. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-89 (1983).

The interests of *amici curiae* are, therefore, twofold. First, their interest is in the proper interpretation of the Port Authority statutory consent to suit at issue in this case and in the proper interpretation of the Port Authority's separate statutory consent to suit with respect to written contracts between *amici curiae* and the Port Authority. Second, the scheduled airlines as *amici curiae* here are extremely interested in ensuring that they

can avail themselves of a Federal forum in order to protect their rights to nondiscriminatory treatment by airport operators: rights which are secured to them by multilateral and bilateral international agreements and Federal law.

STATEMENT

This Brief is directed to the issue of whether the statutes of the States of New York and New Jersey have consented to suits against the Port Authority in certain Federal courts and, thus, effected a partial waiver of any Eleventh Amendment immunity from suit to which the Port Authority and Petitioner, its wholly-owned subsidiary, may have been entitled. This Brief will not address the Port Authority's entitlement in the absence of any waiver to Eleventh Amendment immunity, except to state *amici curiae* agree with Respondents that the court below properly decided in accordance with applicable precedent of the Court that the Port Authority is not an agency or arm of the States within the meaning of the Eleventh Amendment entitled to invoke the Amendment's immunity.

SUMMARY OF ARGUMENT

Considered in its entirety, the statutory consent to suit enacted by the States of New York and New Jersey authorized suits against the Port Authority in specified judicial districts whose Federal courts are geographically situated within the boundaries of the Port of New York. By consenting to suit in these particular Federal courts, the statute effected a partial waiver of any Eleventh Amendment immunity that may otherwise have existed. No other reasonable construction of the statute is possible without rendering meaningless or superfluous significant portions of the statute. Moreover, the language raises such an overwhelming implication of consent to suit in particular Federal courts that neither the Port Authority nor the courts construing the statute have been able to explain in any other rational way the meaning or intent of the language employed.

The designation of certain courts, including particular Federal courts, is in accordance with decisions of the Court permitting a State to condition any consent to suit on where it may be subject to suit.

A review of other Port Authority statutory consents to suit enacted both before and after the statute at issue here confirms that the text of the statutory consent in this case expressly permitted suits against the Port Authority in specified Federal courts. A subsequent statutory consent even clarifies the Port Authority's dual citizenship in both the States of New York and New Jersey and such a designation has no conceivable meaning except in the context of Federal diversity jurisdiction.

Finally, shortly after enactment of the statutory consent to suit at issue here, the Port Authority admitted in Federal court that if the conditions attached to the consent were met, Eleventh Amendment immunity was waived.

ARGUMENT

POINT I

THE LANGUAGE OF THE STATUTORY CONSENT TO SUIT MANIFESTS AN UNAMBIGUOUS INTENT TO SUBJECT THE PORT AUTHORITY TO SUIT IN SPECIFIED FEDERAL COURTS

The standard set by the Court for determining whether particular statutory language emanating from Congress or a State legislature constitutes either abrogation or waiver of a State's Eleventh Amendment immunity is clear:

> [W]e have held that a State will be deemed to have waived its immunity "only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' "

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 239-40 (1985) (citations omitted). Petitioner and its supporting *amici*

take the position that analysis of a portion of the statutory language under consideration, providing for "consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise . . . against the Port of New York Authority", N.Y. UNCONSOL. LAWS § 7101 (McKinney 1979), reveals the consent to fall far short of the Court's requirements to establish waiver. Brief for Petitioner at 34-35; Brief for *Amici Curiae* in Support of Petitioner at 13. Both conclude that the quoted statutory language is merely a waiver of State sovereign immunity and, standing alone, cannot serve as a waiver of Eleventh Amendment immunity. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 n.9 (1984); *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Assn.*, 450 U.S. 147, 150 (1981); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944); Brief for Petitioner at 35; Brief of *Amici Curiae* in Support of Petitioner at 13.

A statute should not be read as an isolated pronouncement, however. Other portions of the same act, to the extent they constitute a whole and lend meaning to the whole, must be considered simultaneously. *See Pennsylvania v. Union Gas Co.*, ____ U.S. ____, 109 S. Ct. 2273, 2278 n.2 (1989) (plurality opinion). All sections of a particular act should be read together because, together, they constitute the law. *Id.* at 2296 (Scalia, J., concurring in part and dissenting in part).

Either one of two criteria must be satisfied by a State statute to constitute a waiver of Eleventh Amendment immunity. The State statute must waive the immunity by "express language" or the statute must do so "by such overwhelming implication from the text as [will] leave no room for any other construction." *Atascadero*, 473 U.S. 234, 239-40. There is no requirement, however, that the Eleventh Amendment be specified *in haec verba* for State statutory language to constitute a wavier of its immunity.[1] *See Pennsylvania v. Union Gas Co.*, ____ U.S.

1 In order to satisfy the concern that abrogation by Congress, unwanted by the States, of Eleventh Amendment immunity could alter the balance of sovereignty between the Federal Government and the States, it would appear the Court could require that Congress specifically mention the Eleventh Amendment in any legislation intended to abrogate the immunity it provides. It is submitted, however, that it would be an unwarranted intrusion upon the powers of the State legislatures to require that any effective waiver by a State of its Eleventh Amendment immunity specifically refer to the Amendment. Such a requirement would appear not to be justified by a desire to avoid construing a State statute as an effective waiver when a State's intent to consent to suits in Federal court is otherwise clear.

at ____, 109 S. Ct. at 2280 n.4 (plurality opinion); *id.* at 2295 n.7 (White, J., dissenting). If a State statue did mention the Eleventh Amendment in an immunity waiver statute it would, undoubtedly, be found an effective waiver of the Amendment's immunity. *Id.* Similarly if a State immunity waiver statute stated in express language its "consent to be sued in Federal court" an effective Eleventh Amendment immunity waiver presumably would also be found.

Other language can also constitute a waiver, for the Court has not endowed any particular language with talismanic significance. When viewed as a whole, which it must be, the Port Authority statutory consent to suit language under review satisfies both the "express language" criteria and the "overwhelming implication" criteria.

A. The Statutory Consent to Suit Expressly Permits Suits Against the Port Authority in Certain Federal Courts

Sections 7101 and 7106 of New York's Unconsolidated Laws were enacted at the same time. Act of March 30, 1950, ch. 301, §§ 1, 6, 1950 N.Y. Laws 979, 980. At a minimum, therefore, Sections 7101 and 7106 must be read together to determine the extent of the consent to suit and the conditions attached to it. *Pennsylvania v. Union Gas Co.*, ____ U.S. at ____, 109 S. Ct. at 2278 n.2 (plurality opinion).

The first section of the statute consenting to suit against the Port Authority, N.Y. UNCONSOL. LAWS § 7101 (McKinney 1979), is unlimited in scope, not restricted to any particular parties, courts or types of relief except, with respect to penalties, causes of action accruing before the statute's effective date and injunctive relief, as provided in four subsequent sections, N.Y.

UNCONSOL. LAWS §§ 7102-05 (McKinney 1979), none of which have any bearing on the question presented. *See Trippe v. Port of New York Authority*, 14 N.Y. 2d 119, 124-25, 249 N.Y.S. 2d 409, 412, 198 N.E.2d 585, 587 (1964). Section 7106 conditions the consent to suit in Section 7101 and provides in relevant part

> The foregoing consent [to suit in section 7101] is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district. The port authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings . . . .

N.Y. UNCONSOL. LAWS § 7106 (McKinney 1979).

Although expressed in terms of "venue", the language of Section 7106 specifically conditions the Section 7101 consent to suits, *inter alia*, to a "judicial district established by . . . the United States, and situated wholly or partially within the port of New York district." *Id.* In itself, this language is an express statement that suits against the Port Authority in Federal judicial districts have been otherwise consented to by Section 7101.

The language used in the statute in 1950 to consent to suit against the Port Authority only in certain Federal courts is nothing more than a precise specification as to the extent of the consent. The language is also a precursor of the same principle applied today in the Eleventh Amendment context. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 ("A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued"). The unlimited consent to suit in Section 7101 read together with Section 7106 specify in "express language" *where* the consent to suit is effective. The *where* specified includes Federal judicial districts within the Port district. It must, therefore, be taken to refer to Federal courts within those Federal judicial districts if the language is to be given any meaning at all.

B. The Text of the Statutory Consent to Suit Gives Rise to the Overwhelming Implication that Suits in Certain Federal Courts Were Authorized

Conditioning the Port Authority's consent to suits to those suits brought only in certain courts, including Federal courts, conveys an "overwhelming implication from the text" that in the absence of such a limitation the consent to suit would otherwise have been effective as to all courts in the State, including all Federal courts. *See Pennsylvania v. Union Gas Co.*, ____ U.S. at ____, 109 S. Ct. at 2278-80 (plurality opinion) ("Unless Congress intended to permit suits brought by private citizens against the States, therefore, the highly specific language of § 101(20)(D) was unnecessary"); *id.* at 2296 (Scalia, J., concurring in part and dissenting in part) ("The inclusion of States, apparently for all purposes, within the definition of 'person', reinforced by the language of the limitation that assumes State liability equivalent to the liability of private individuals, leaves no fair doubt that States are liable for money damages"). *Cf. Trippe v. Port of New York Authority*, 14 N.Y. 2d 119, 124-25, 249 N.Y.S. 2d 409, 412, 198 N.E. 2d 585, 587 (1964) ("The sweeping coverage of chapter 301 [§§ 7101-12] simply makes impossible any exclusion therefrom of any particular kinds of suits except for those specifically excluded in other parts of chapter 301. . . .").

No other rational explanation or reasonable construction of Sections 7101 and 7106 with its "venue" provision, has been or can be presented. Neither Petitioner nor any court construing the Port Authority consent to suit has been able to suggest a construction which would avoid a finding by the Court that the States of New York and New Jersey did not understand the distinction between "venue" and "jurisdiction." *See also* Brief for *Amici Curiae* in Support of Petitioner at 17. Petitioner at one point even suggested the venue provision was an effort to restrict the Federal court venues in which the Port Authority might be sued where consent was unnecessary. That suggestion was, as it should have been, summarily rejected. *Leadbeater v. Port Authority Trans-Hudson Corp.*, 873 F.2d 45, 49 (3d in

1989) ("It is not apparent to us that the venue provision applies in such cases, where consent to suit is not required").

Petitioner argues that the "venue" provision in section 7106, insofar as it refers to "judicial districts established by . . . the United States", is not an affirmative consent to "jurisdiction" in the Federal courts. It supplies no explanation, however, for its meaning or its inclusion in the section or, indeed, its inclusion in the entire statutory structure of Sections 7101 to 7112. When, however, the "sweeping coverage of chapter 301 [§§ 7101-12]", *Trippe v. Port of New York Authority*, 14 N.Y.2d at 124-25, 249 N.Y.S.2d at 412, 198 N.E.2d at 587, and the nature of the consent to suit, Section 7101, is recognized as not limited in scope, in extent or to any particular court, whether State or Federal, the subsequent limitations on that consent embodied in Sections 7102 through 7112 (all part of chapter 301) are completely understandable. One of the conditions to the consent is that the Port Authority shall be sued only in specified courts, including certain Federal courts. If suit is brought in any other court, i.e., the wrong "venue", then the consent's condition is not satisfied; the consent is, effectively, withdrawn and deprives such a court of "jurisdiction."[2] *See* Brief for Appellee Port Authority at 7, 12, *Rao v. Port of New York Authority*, 222 F.2d 362 (2d Cir. 1954). App. 8, 13.

No other reasonable construction of the statutes is possible. The text of the Port Authority consent to suit, when read with its accompanying conditions, gives rise to the "overwhelming implication" that the Port Authority consented to suits against it in certain specified Federal courts and, consequently, waived any Eleventh Amendment immunity to which it may have been entitled.

2 Construing the statutory framework in this way eliminates any alleged confusion purportedly resulting from use of "venue" terminology and permits the normal presumption that the States of New York and New Jersey understood the difference between "venue" and "jurisdiction".

POINT II

ANALYSIS OF OTHER STATUTES CONSENTING TO SUITS AGAINST THE PORT AUTHORITY COMPELS THE CONCLUSION THAT IT AGREED TO BE SUBJECT TO SUIT IN CERTAIN FEDERAL COURTS

There is no question presented here[3] with respect to a Congressional abrogation of any Eleventh Amendment immunity that the Port Authority may be entitled to assert. Congressional consent to the bi-state compact creating the Port Authority occurred in 1921. 42 Stat. 174 (1921). Until passage of the consent statutes, the Port Authority had been totally immune from suit. *See, e.g., Port Authority Police Benevolent Association v. Port Authority of New York*, 819 F.2d 413, 418 (3d Cir. 1987), *cert. denied*, ____ U.S. ____, 109 S. Ct. 344 (1987). There was no "sue and be sued" clause in the original bi-state compact or the Congressional consent that would raise the issue of Congress' intent with respect to approval of the compact. *See, Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959).

The consent to suit at issue here, Act of March 30, 1950, ch. 301, 1948 N.Y. Laws 979 (codified at N.Y. UNCONSOL. LAWS §§ 7101-12 (McKinney 1979)), was not the first instance when the States had consented to suit against the Port Authority. They had previously consented to suits against the Port Authority for certain specified purposes. *See* Act of April 11, 1947, ch. 802, 1947 N.Y. Laws 1481 (current version at N.Y. UNCONSOL. LAWS §§ 6631-47 (McKinney 1979)). That earlier statute waiving the Port Authority's immunity was somewhat different in scope from the one at issue here and, although nearly identical, analysis of the differences in language and structure employed

3 Whether the Foreign Sovereign Immunities Act of 1976 constitutes a Congressional abrogation of any Port Authority Eleventh Amendment Immunity if sued by an airline which qualifies as a "foreign state" is not presented here either. Pursuant to the reasoning in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. at 488-89, and the teachings of the Court regarding abrogation of immunity, those airline *amici curiae* which do so qualify submit that the FSIA abrogates any such immunity.

is helpful and relevant. *Cf. Pennsylvania v. Union Gas Co.*, ____ U.S. at ____, 109 S. Ct. at 2279 ("It is also highly significant that . . . Congress used language virtually identical to that it chose in waiving the Federal Government's immunity from suits for damages under CERCLA"). A review of the earlier consent's background and amendments persuasively demonstrates that the subsequent statutory consent to suit against the Port Authority in 1950, the one at issue here, included a consent to suit in Federal court.[4]

The first consent to suit against the Port Authority became law on April 11, 1947. *See* Act of April 11, 1947, ch. 802, § 8(c), 1947 N.Y. Laws 1481, 1485 (current version at N.Y. UNCONSOL. LAWS § 6638(c)). The consent was included in a law passed "to facilitate the financing and effectuation of air terminals by the Port of New York Authority and agreeing with the State of New Jersey with respect thereto." *Id.*, Preamble. The consent itself was brief and confined to suits with respect to agreements reached by the Port Authority pursuant to the power granted by the statute.

> The states of New York and New Jersey consent to suits against the Port Authority upon such agreement by any county, city, borough, village, township, municipality, public agency or authority for the recovery of any moneys agreed to be paid by the Port Authority thereunder, and for such purpose only, and any judgment therein against the Port Authority shall be payable only from such funds as the Port Authority may have available for the payment of such judgment.

Act of April 11, 1947, ch. 802, § 8(c), 1947 N.Y. Laws 1481, 1485.

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4 This analysis is not contrary to the Court's holding in *Dellmuth v. Muth*, ____ U.S. ____, 109 S. Ct. 2397, 2401 (1989), that legislative history cannot be resorted to when construing a Congressional enactment in the Eleventh Amendment context. A State statute is under consideration here and the concerns which led to the holding in *Dellmuth* are not as weighty when State legislative action is under consideration. *See* n.1, *supra*. In any event, this analysis only confirms what otherwise clearly appears from the text.

This consent to suit was amended one year later. Among other provisions, the 1948 amendment to section 8(c) of the 1947 Act included a paragraph dealing with "venue." It provided as follows:

> When rules of venue are applicable, the venue of any such suit, action or proceeding shall be laid in the county or judicial district in which the air terminal, which is the subject matter of such agreement between the Port Authority and the city or other municipality, or any part thereof, is located.

Act of April 3, 1948, ch. 785, § 1, 1948 N.Y. Laws 1440, 1441 (codified at N.Y. UNCONSOL. LAWS § 6638(c) (McKinney 1979)).

The "venue" provision added by the 1948 Act to the statutory consent to suit with respect to acquisition of air terminals used language referring to a "judicial district in which the air terminal . . . is located." *Id.* In the 1950 Act at issue here, the "venue" language was modified in three respects from that in the 1948 amendment. *Compare* N.Y. UNCONSOL. LAWS § 6638(c) (McKinney 1979) *with* N.Y. UNCONSOL. LAWS § 7106 (McKinney 1979). First, proper "venue" under section 7106 was made a condition to the consent to suit in section 7101. Second, the reference to "judicial districts" was clarified by addition of the phrase "established . . . by the United States." Third, a sentence was added deeming the Port Authority "a resident of each such . . . judicial district for the purpose of such suits, actions or proceedings." N.Y. UNCONSOL. LAWS § 7106 (McKinney 1979).

All of these modifications reinforce the conclusion reached from analysis of the text itself that the States of New York and New Jersey in the 1950 Act consented to suits against the Port Authority in certain courts, including Federal courts within the Port district. Unlike the limited consent to suit in the 1947 statute, which was confined to suits by cities or municipalities arising out of agreements transferring air terminals to the Port Authority, N.Y. UNCONSOL. LAWS § 6638(c) (McKinney 1979), the 1950 statutory consent itself was all encompassing

and not restricted to any particular parties, courts, types of action or subject matter. N.Y. UNCONSOL. LAWS § 7101 (McKinney 1979); *Trippe v. Port of New York Authority*, 14 N.Y. 2d at 124-25, 249 N.Y.S. 2d at 412, 198 N.E.2d at 587. The "venue" provision in the 1950 statutory consent necessarily had to be, and was, recast to condition the unlimited consent of Section 7101. The phrase "established . . . by the United States" made clear that the reference to "judicial district" meant Federal judicial districts. Finally, the addition of the sentence establishing the residence of the Port Authority for "venue" purposes comported with recent changes in the Federal general venue statute basing venue on the "residence" of a defendant.[5] *See* Act of June 25, 1948, ch. 646, 62 Stat. 935 (current version at 28 U.S.C. § 1391).

A further comparison of the 1950 statutory consent to suit with the 1953 statutory consent to suit against the Port Authority, Act of March 24, 1953, ch. 143, 1953 N.Y. Laws 152 (codified at N.Y. UNCONSOL. LAWS §§ 7131-36 (McKinney 1979)), also reinforces the conclusion that the consent to suit at issue here encompassed a consent to suit in Federal court. *Compare* N.Y. UNCONSOL. LAWS §§ 7101, 7106 (McKinney 1979) *with* N.Y. UNCONSOL. LAWS §§ 7131, 7133 (McKinney 1979). The 1953 consent to suit was specifically proposed by the Port Authority in accordance with an understanding reached between the Port Authority and scheduled airlines, including one of the *amici*, operating at Idlewild (now JFK and formerly New York) International Airport.[6] *See* Letter from Sidney Goldstein, Port Authority General Counsel, to Hon. George

5 The unlimited consent, the conclusive reference to Federal courts and delineation of "residence" clearly anticipated diversity jurisdiction in certain Federal courts because with the 1950 Act the Port Authority would be subject to suits by citizens of States other than New York and New Jersey and by aliens. The 1947 consent to suit, as amended, only applied to cities or municipalities of those two States.

6 This specific consent may have been necessary to avoid the effect of Section 7103 of the 1950 Act barring suits on contracts entered into before the effective date of the consent. *See* N.Y. UNCONSOL. LAWS § 7103 (McKinney 1979).

M. Shapiro, Counsel to the Governor (March 11, 1953) (This law "would implement the memorandum of agreement executed in 1945 by the Airlines and the Port Authority, through the personal efforts of Governor Dewey, to make the definitive leases for use of New York International Airport by the Airlines enforceable in the courts"). App. 16.[7]

The venue section of the 1953 statute is almost identical to the venue section in the 1950 consent statute.[8] *Compare* N.Y. UNCONSOL. LAWS § 7133 (McKinney 1979) *with* N.Y. UNCONSOL. LAWS § 7106 (McKinney 1979). The 1953 "venue" provision differs from the 1950 provision in two respects only: (1) it does not contain a separate consent to liability for tortious acts as if the Port Authority were a private corporation and (2) it has added language that the Port Authority shall be deemed a citizen of both New York and New Jersey. N.Y. UNCONSOL. LAWS § 7133 (McKinney 1979) ("The port authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings *and shall be deemed to be a citizen of both of said two states*") (emphasis added).

The language regarding the citizenship of the Port Authority was not included in the Act of March 30, 1950, Ch. 301, § 6, 1950 N.Y. Laws 979, 980, N.Y. UNCONSOL. LAWS § 7106 (McKinney 1979). Addition of the citizenship language to the later 1953 statute had no impact upon the ability of any state court to hear an action against the Port Authority. The only conceivable reason for specifying the citizenships of the Port Authority was to clarify the dual aspect of its citizenship and

7 The copy of the correspondence in the Appendix to the Brief was in the New York Legislative Bill Jacket accompanying the 1953 Act upon its approval by the Governor of New York.

8 The structure of the 1953 statute, however, is similar to the 1948 venue provisions. Because both the 1947 consent to suit, as amended in 1948, and the 1953 consent to suit were of limited scope, effective only as to certain specified entities for suits arising out of specified written agreements, the "venue" provision in the 1947 and 1953 Acts are not "conditions" to the consents. For the unlimited 1950 consent to suit at issue here, its "venue" provisions are structured as a condition to the consent.

limit diversity jurisdiction in a Federal court to those instances where the plaintiff was a citizen of some State or country other than New York or New Jersey.[9]

Analysis of each of the Port Authority's consent to suit statutes, enacted both before and after the one at issue here, is instructive and persuasively demonstrates that the 1950 statute, N.Y. UNCONSOL. LAWS §§ 7101-12 (McKinney 1979), did, and was intended to, consent to suit against the Port Authority in certain geographically specified Federal courts and was, consequently, an effective, albeit geographically restricted, waiver of any Eleventh Amendment immunity.

POINT III

THE PORT AUTHORITY HAS PREVIOUSLY ADMITTED IT CONSIDERED ELEVENTH AMENDMENT IMMUNITY TO HAVE BEEN WAIVED IF THE CONDITIONS OF THE STATUTORY CONSENT TO SUIT WERE SATISFIED

Shortly after enactment of the 1950 consent statute, a diversity suit was commenced against the Port Authority for damages resulting from an accident in the United States District Court for the Eastern District of New York. In the district court the Port Authority moved for dismissal of the complaint for lack of subject matter jurisdiction for failure to comply with the conditions of the consent statute in that the plaintiff (a) failed to commence his action within one year and (2) failed to serve a notice of claim. *Rao v. Port of New York Authority*, 122 F. Supp. 595, 596 (E.D.N.Y. 1954), *aff'd*, 222 F.2d 362 (2d Cir. 1955). *See also* Motion for Dismissal of Complaint, Transcript

9 The specification of the Port Authority's citizenship in the 1953 Act did not make any substantive change and was clearly for clarification purposes only. The specification of residence in the Port Authority's 1950 statutory consent to suit was sufficient under the Fourteenth Amendment for diversity purposes because every U.S. citizen is also a citizen of the State of residence. U.S. CONST. amend. XIV, § 1. If a substantive change was accomplished by addition of the phrase, then this case will not be controlling with respect to construction of the 1953 statutory consent to suit.

of Record at 3-4, *Rao v. Port of New York Authority*, 222 F.2d 362 (2d Cir. 1955). Both of those requirements were conditions of the consent to suit and were contained in Section 7 of chapter 301 of the Laws of New York. N.Y. UNCONSOL. LAWS § 7107 (McKinney 1979).

No claim was made that the consent to suit, N.Y. UNCONSOL. LAWS § 7101 (McKinney 1979), did not permit suit in Federal court as a result of any Eleventh Amendment immunity from suit. *See* Affidavit of Francis X. Curley, Transcript of Record at 5-8, *Rao*, *id.* The district court granted the motion to dismiss on the ground that it was not commenced within the one year period upon which the consent to suit was conditioned. *Rao*, 122 F. Supp. at 597.

Plaintiff appealed from the dismissal. There is no doubt that in the *Rao* appeal the Port Authority was aware of its Eleventh Amendment immunity and *considered it to have been waived* if the conditions of the consent statute were met. *See* Brief of Appellee Port Authority at 7, *Rao v. Port of New York Authority*, 222 F.2d 362 (2d Cir. 1955). App. 8.

> Appellant's brief (pp. 2, 3) concedes that his standing to sue the Port Authority was created by the bi-state suability legislation (Ch. 301, Laws of N.Y. 1950; Ch. 204, Laws of N.J. 1951) and that the courts have jurisdiction over the person of the Port Authority and the subject matter of the action only where the statute has been complied with. *Since compliance is absent, the Eleventh Amendment effectively bars jurisdiction over this suit.*

Id. (emphasis added).

The Port Authority was intimately familiar at the time of the *Rao* case with the intent and scope of the 1950 consent to suit. The General Counsel to the Port Authority at the time of the *Rao* appeal, Sidney Goldstein, who was the attorney for the Port Authority on the Second Circuit Brief, was Assistant General Counsel in 1948, before enactment of the 1950 consent to suit.

In the *Rao* case the Port Authority argued that in the absence of compliance with the statute, the Eleventh Amendment barred jurisdiction. Conversely, it effectively admitted that any Eleventh Amendment immunity is waived if there has been compliance with the statute.

This admission by the General Counsel of the very entity to which the statute applies is extraordinarily significant. It is close in time to enactment of the consent to suit statute. It establishes an awareness on the part of the Port Authority that the Eleventh Amendment arguably applied to bar a lawsuit in the absence of compliance with the conditions imposed on the consent to suit. Accordingly, it is an authoritative pronouncement of the extent and scope of the consent to suit and Petitioner should not now be heard to contradict the previous admission of the Port Authority.[10]

Neither the passage of time, decisions of the Court nor a change in the Port Authority's position can rescind the consent to suit against the Port Authority in certain Federal courts given by the legislatures of New York and New Jersey: only the States can modify or revoke the consent if they choose to do so, assuming revocation would not contravene any other law. Until such time as New York and New Jersey revoke or modify the consent to suit, the Federal courts specified in Section 7106 have jurisdiction over suits against the Port Authority.

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10 Had the Attorney General of the State of New York in 1954 made to the Second Circuit the statement contained in the *Rao* Brief, it is submitted that the Court would give little or no weight to a contradictory statement by New York's present Attorney General as to the intent or meaning of a statute enacted 40 years ago, unless based on newly discovered and conclusive legislative history.

CONCLUSION

The decision of the court below should be affirmed in all respects.

Respectfully submitted,

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Japan Air Lines Co., Ltd.
Koninklijke Luchtvaart
Maatschappij, N.V.-
KLM Royal Dutch Airlines
Swiss Air Transport Co., Ltd.
30 Rockefeller Plaza
Suite 4340
New York, New York 10112
(212) 581-7575

Dated: January 16, 1990

APPENDIX

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHANNAPRAGADA S. RAO, also known as
RAO S. CHANNAPRAGADA,
Plaintiff-Appellant,

against

THE PORT OF NEW YORK AUTHORITY,
Defendant-Appellee,

and

PARKING LOT ASSOCIATES CORPORATION,
a California corporation,
Defendant.

BRIEF OF APPELLEE

SIDNEY GOLDSTEIN,
Attorney for Defendant-Appellee,
The Port of New York Authority.

JUDICIAL PRINTING CO., INC., 63 Beekman St., N. Y.—BEekman 3-0084-54

To be argued by
DANIEL B. GOLDBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHANNAPRAGADA S. RAO, also known as
RAO S. CHANNAPRAGADA,
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Defendant.

BRIEF OF APPELLEE

Statement

This memorandum is submitted by The Port of New York Authority (hereinafter referred to as the Port Authority) defendant-appellee, in opposition to the appeal by plaintiff-appellant from an order of United States District Court for the Eastern District of New York dismissing the complaint against the Port Authority for lack of jurisdiction. This memorandum makes two points:

First, the instant order is not a final appealable order within the meaning of § 1291 of 28 U. S. C. A. and therefore this Court lacks jurisdiction.

Second, plaintiff-appellant has failed to comply with the jurisdictional requirements of the bi-state legislation waiving the sovereign immunity from suit against the Port Authority.

The order (R. 22, 23) dismissed plaintiff's complaint against the Port Authority, severing the cause of action as to it, in the suit against the Port Authority and California Parking Associates as joint defendants. The court found that plaintiff had failed to comply with the jurisdictional requirements conditioning the consent to suits against the Port Authority contained in Chapter 301, Laws of New York, 1950; Chapter 204, Laws of New Jersey, 1951.

The District Court did not make an express determination that there was no just reason for delay and merely directed entry of judgment.

Facts

As plaintiff concedes (Brief, p. 2), his sole standing to sue the theretofore immune Port Authority is found in the aforesaid bi-state statutes which consent to suits against the Port Authority as follows:

> "§ 7. The foregoing consent is granted upon the *condition* that any suit, action or proceeding prosecuted under this act *shall be commenced within one year after the cause of action therefor shall have accrued*, and *upon the further condition* that in the case of any suit, action or proceeding for the recovery or payment of money, prosecuted or maintained under this Act a *notice of claim shall have been served upon the Port Authority* by or on behalf of the plaintiff or plaintiffs at least sixty days before such suit, action or proceeding is commenced." (Emphasis added.)

Section 8 of the legislation sets forth the requisite contents of the notice of claim required by Section 7.

While the District Court did not decide the question of the adequacy of the appellant's notice of claim, basing its decision to dismiss solely on the jurisdictional grounds of Section 7 and while the Port Authority is not arguing the adequacy of the notice on this appeal it must be pointed out that the Port Authority contended below that it has never received from the plaintiff-appellant a proper notice of claim stating the place where and the manner in which his cause of action, if any, arose.

The facts which plaintiff seeks to fit within the framework of these jurisdictional pre-conditions to suit are contained in the opinion of the District Court by Judge RAYFIEL (R. 20):

> "The plaintiff concedes that the accident which is the basis of the action occurred on December 10, 1952, that the complaint was filed in this court on December 18, 1953, and that it was served on the defendant Port of New York Authority on December 24, 1953."

It is evident and conceded in plaintiff's brief (p. 3) that the action was commenced *not* within one year after the accident on which it is based, but was commenced 8 days afterward.

POINT I

The judgment sought to be appealed is not a final order within the meaning of 28 U. S. C. A. 1291 and, therefore, the Court of Appeals lacks jurisdiction.

The Court of Appeals has limited jurisdiction to hear appeals, *i.e.*, under 28 U. S. C. A. 1292, in certain limited situations not here applicable, and under 28 U. S. C. A. 1291 which provides that this Court may hear appeals from

> "final decisions of the district courts."

This is not a final decision within the intent of 28 U. S. C. A. 1291, for where a suit is brought against multiple parties whose liability is alleged to be "joint," a judgment terminating the action as to one or more, but less than all of the parties, is not final regardless of whether such a judgment is based on the merits or on jurisdictional or venue grounds. In *Atwater v. Inter American Coal Corp.*, 111 F. 2d 125 (C. A. 2d 1940) this court held:

> "• • • a judgment or order dismissing an action as to less than all of several defendants jointly charged is not a final decision for purpose of appeal. Hohorst v. Hamburg-American Packet Co., 148 U. S. 262, 13 S. Ct. 590, 37 L. Ed. 443; Bank of Rondout v. Smith, 156 U. S. 330, 15 S. Ct. 358, 39 L. Ed. 441; Menge v. Warriner, 5 Cir., 120 F. 816; Hewitt v. McCormick Lumber Co., 2 Cir., 22 F. 2d 925; Bush v. Leach, 2 Cir., 22 F. 2d 296; Fields v. Mutual Benefit Life Insurance Co., 4 Cir., 93 F. 2d 559; Moss v. Kansas City Life Insurance Co., 8 Cir., 96 F. 2d 108."

In addition to cases there cited, some of the more recent cases in point are:

Porter v. American Distilling Co., Inc., 157 F. 2d 1012 (C. A. 2d 1946);
Tauzin v. St. Paul Mercury Indemnity Co., 195 F. 2d 223 (C. A. 5th 1952);
Drown v. U. S. Pharmacopoeial Convention, 198 F. 2d 470 (C. A. 9th 1952);
Dunaway v. Standard Oil Co., 178 F. 2d 884 (C. A. 5th, 1949), cert. den. 339 U. S. 965 (1950);
Cuhn v. Canteen Food Service Inc., 150 F. 2d 55 (C. A. 7th 1945).

See generally, *Moore's Federal Practice*, 2d Ed. Vol. 56, p. 156, *et seq.*

In the present appeal we have the clearest case for the application of the rule—a complaint against two alleged

joint tort feasors and this Court's holding in the *Atwater* case, *supra* is dispositive of this point.

The rule of non-finality in cases of this character finds its basis in the theory that appeals are not to be brought piecemeal to the Courts of Appeal and has singular applicability to the facts in the instant case. Here recovery for one alleged harm founded on one factual pattern is sought against two different defendants allegedly jointly liable.

The foregoing compels the conclusion that the Court lacks jurisdiction to hear this appeal since liability in the instant matter is joint and a final order has not been rendered by the district court.

POINT II

The Court lacks jurisdiction because appellant has not met the jurisdictional condition, in the bi-state statutes consenting to suits against the Port Authority, that action must be commenced within one year from the date of accrual.

Appellant concedes that as the governmental agency of the States of New York and New Jersey the Port Authority is not subject to suit in the absence of express statutory consent (Brief, p. 2). He concedes also that the Court has jurisdiction of his suit only if he has complied with the conditions set forth in the recent legislation by which the states consented to suit against the Port Authority (Brief, p. 3). He concedes that those statutes impose as a "condition" of the consent therein given that suit be commenced within one year after the cause of action has accrued (Brief, p. 2), and he concedes that this suit was brought more than a year after the occurrence of the accident upon which it is based (Brief, pp. 2, 3).

Appellant seeks to retrieve his case, however, by asking the Court to hold that notwithstanding the express one year condition, the suability statutes permit suit within one year and sixty days after the accident because of the further condition in Section 7 that a prescribed notice be filed sixty days before the commencement of the action. The argument is based on three grounds:

> (a) that as "remedial legislation" the statutes should be liberally construed in favor of claimant;
>
> (b) that therefore the statutes must be construed to permit suit within one year and sixty days after the cause of action accrued; and
>
> (c) that the cause of action did not accrue until sixty days after the accident.

The argument is not well founded on any of these grounds for the following reasons:

(1) Because the statutes constitute waivers of sovereign immunity from suit, they must, under universal rules of construction of such statutes, be strictly construed to require precise conformity with all the conditions imposed.

(2) The statutes here involved have two independent conditions, one for the commencement of suit within a year after the cause of action accrues and the "further condition", independently stated, that a specified notice be served at least sixty days in advance of suit. Not only the internal evidence of the statutes but the rule of strict construction requires that both of these conditions be literally complied with.

(3) While it is true that the New York Civil Practice Act adds to a period of limitations time equivalent to the period of statutory stay, this cannot avail appellant because (a) as appellant con-

cedes, a New York statute cannot modify the bi-state suability statutes which constitute an agreement between New York and New Jersey susceptible of amendment only by both States acting concurrently (Brief, pp. 5, 6) and (b) the fact that the State of New York had to pass a statute to produce this result as a matter of local law, rebuts rather than supports an argument that the Port Authority suability statutes, without the equivalent of C. P. A. § 24, can be construed to extend the one year period expressly provided as a condition for consent to the Court's jurisdiction.

(4) The cases uniformly hold that a cause of action for negligence charged against a public agency accrues on the date of the alleged accident, even though a notice must be filed a specified number of days before suit may be commenced.

Each of these four reasons is discussed in the following subdivisions of this Point.

1. The statutes under which the Court's jurisdiction is alleged must be strictly construed against appellant because of the uniform rule of strict construction of statutes waiving sovereign immunity from suit.

Appellant's brief (pp. 2, 3) concedes that his standing to sue the Port Authority was created by the bi-state suability legislation (Ch. 301, Laws of N. Y. 1950; Ch. 204, Laws of N. J. 1951) and that the courts have jurisdiction over the person of the Port Authority and the subject matter of the action only where the statute has been complied with. Since compliance is absent, the Eleventh Amendment effectively bars jurisdiction over this suit.

Prior to the passage of the recent bi-state suability legislation, the Port Authority as a direct governmental agency of the States of New York and New Jersey, was

held to be clothed with the sovereign immunity from suit of the two States which created it, in a long and unbroken line of decisions in the Courts of the United States, New York and New Jersey:

Howell v. *Port of New York Authority*, 34 F. Supp. 797 (D. N. J. 1940);
Lord Electric Co. v. *The Port of New York Authority*, 281 App. Div. 693 (2d Dept. 1952);
Hergott v. *Port of New York Authority*, N. Y. L. J. June 10, 1944, p. 4422 (Sup Ct. N. Y.); aff'd 269 App. Div. 770 (1st Dept. 1945);
Marmor v. *The Port of New York Authority*, N. Y. L. J. October 3, 1952, p. 693 (Sup. Ct., Kings);
Kelly v. *The Port of New York Authority*, N. Y. L. J. June 20, 1951 p. 2290 (Sup. Ct., N. Y.);
The Port of New York Authority v. *Elman*, 196 Misc. 91 (N. Y. C. Mun. Ct. 1949);
Roochvarg v. *The Port of New York Authority*, 190 Misc. 406 (Sup. Ct., Queens 1947);
LeBeau Piping Corp. v. *City of New York and The Port of New York Authority, et al.*, 170 Misc. 644 (Sup. Ct., N. Y. 1938);
Voorhis v. *Cornell Cont. Corp. and The Port of New York Authority*, 170 Misc. 908 (N. Y. City Court 1938);
Pink v. *Port of New York Authority*, N. Y. L. J. February 3, 1938, p. 567 (Sup. Ct. N. Y.);
Miller v. *The Port of New York Authority*, 18 N. J. Misc. 601 (Sup. Ct. 1939).

See also:

Commissioner v. *Shamberg's Estate*, 144 F. 2d 998 (1944), cert. den., 323 U. S. 792 (1945).

It was in the light of this rule of immunity established by the foregoing cases that the Legislatures of New York

and New Jersey consented to suits against the Port Authority on compliance with the jurisdictional terms and conditions contained in the bi-state statutes granting such consent. Far from being ordinary remedial statutes as plaintiff-appellant argues, the bi-state legislation waives sovereign immunity and as such is to be strictly rather than liberally construed.

As the Court below held (R. 20) with regard to these statutes,

> "They provide that the action must be commenced within one year from the time that the cause of action accrued. Statutes wherein sovereign immunity against suit is waived must be strictly construed. *Schillinger* v. *United States*, 165 U. S. 163; *Mulhens* v. *Higgens*, 55 Fed. Supp. 42."

The requirement that claimants comply strictly with the jurisdictional conditions of statutes waiving sovereign immunity from suit is a rule of law which has been repeatedly stated by the Courts of the United States and New York. The State of New Jersey is to this day not suable, a fact highlighting the strictness with which these statutes must be construed. Restricting citation only to cases involving a requirement that suit or claim be instituted within a specified time as a condition and waiver of immunity the following are clear holdings that strict compliance with such a requirement is mandatory:

[Decisions in the United States Courts]

Schillinger v. *United States*, 155 U. S. 163 (1894);
United States v. *Michel*, 282 U. S. 656-659 (1930);
Munro v. *United States*, 303 U. S. 36-41 (1938);
United States v. *Sherwood*, 312 U. S. 584-590 (1940);
Graf v. *United States*, 24 F. Supp. 54 (U. S. Ct. of Claims, 1938);
Turkett v. *United States*, 76 F. Supp. 769, 770 (N. D. N. Y. 1948);

Ferd. Mulhens, Inc. v. *Higgins*, 55 F. Supp. 42, 44 (S. D. N. Y. 1943);
Franzino et al. v. *United States*, 83 F. Supp. 10, 11 (D. N. J. 1949);
Crescitelli v. *United States*, 66 F. Supp. 894 (E. D. Pa. 1946).

[Decisions in the Courts of New York]:

Gates v. *State*, 128 N. Y. 221, 228 (1891);
Ross v. *State*, 186 App. Div. 156 (3rd Dept. 1919);
Munzer v. *State*, 41 N. Y. S. 2d 98 (Ct. of Cl. N. Y. 1943);
Slocum v. *State*, 177 Misc. 114 (Ct. of Cl. N. Y. 1941);
Guaranty Trust Co. v. *State*, 186 Misc. 676 (Ct. of Cl. N. Y. 1946);
Wheeler v. *State*, 49 N. Y. S. 2d 939 (Ct. of Cl. N. Y. 1944).

In *Gates* v. *State*, *supra*, the leading case in New York, the rule is stated thus:

> "The citizen who seeks to avail himself of the privilege to sue the State, *must be held to strictness in procedure;* just as it must be held in all cases, where the remedy is created by and is enforceable solely through the provisions of some statute." (Emphasis added.)

Mulhens v. *Higgins*, 55 F. Supp. 42 (S. D. N. Y., 1943) is a particularly striking illustration of this rule of strict compliance. There, a claimant who had commenced suit *one day* after the termination of a two years' jurisdictional period set for suits against the United States was held to be barred from maintaining the action even though the last day of the two year period was a Sunday. The rule of strict construction negated the claimant's contention that the Federal Rules of Civil Procedure permitted

an additional day where the final day to act was a Sunday or Holiday. The Court held that the Rules of Civil Procedure could not broaden the Court's jurisdiction beyond that granted in the statute consenting to suits against the United States.

The rule was well stated by the Supreme Court of the United States in *Schillinger* v. *U. S.*, 155 U. S. 163 (1894):

> "The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination. *Beyond the letter of such consent the courts may not go, no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the Government.*" (Emphasis added.)

The result reached by the Court below is morally, as well as juridically sound. As the Court of Appeals of New York held in *Gates* v. *State*, 121 N. Y. 221, 228 (1891) of a late claim against the State of New York:

> "The result reached is not, on general grounds, unjust. The claimant's remedy was lost by the failure to make use of means from the very first moment available to him. There was in existence a tribunal before which the claim could at all times have been prosecuted against the State. The omission to commence the proceedings in the mode and within the time pointed out by the Act * * * which authorized such claims to be heard and determined * * * operated to bar any recovery."

2. The suability statutes involved have two separate and independent conditions, one for the commencement of suit within a year and the other for a sixty-day notice in advance of suit. A strict compliance with each is required.

The suability legislation under which the instant suit is maintained sets forth two distinct conditions precedent to the maintenance of an action against the Port Authority. Section 7 provides

> "The foregoing consent is granted upon *the condition* that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year after the cause of action therefor shall have accrued, and upon the *further condition* that in the case of any suit, action or proceeding for the recovery or payment of money prosecuted or maintained under this act, a notice of claim shall have been served upon the Port Authority by or on behalf of the plaintiff or plaintiffs at least sixty days before such suit, action or proceeding is commenced." (Emphasis added.)

It is significant that the requirements are not set forth as part of a single condition but are separately enumerated as an initial condition and a "further condition."

Both of these conditions are perfectly capable of compliance and hundreds of suits have been brought against the Port Authority alleging full compliance with both.

There is nothing ambiguous about the language of the statute so as to require construction at all. It is evident that the primary condition of the court's jurisdiction over the Port Authority is that suits against it must be commenced within one year. "One year" does not mean "one year and sixty days." The sixty-day provision produces the result that suit may not be commenced *sooner* than sixty days after the accident has happened upon which the claim is based. But there is nothing in the statute which

permits the claimant to delay the filing of his notice for a full year and thus by his own neglect to extend the period within which suit must be commenced beyond the one year prescribed by the statutes. While, in our view, the statutes are unambiguous and therefore not capable of construction so as to enlarge the one year period expressly set by the Legislatures, still if there were room for construction, the universal rule of strict construction of statutes waiving sovereign immunity from suit would compel the same conclusion.

A related situation occurred in *Bernreither* v. *City of New York*, 123 App. Div. 291, 293 (1st Dept., 1908), aff'd 196 N. Y. 506 (1909). The case did not involve a jurisdictional condition set in an immunity waiver statute but rather dealt with an ordinary period of limitations in a suit against a city. A one year period of limitations was set and there was another proviso in the statute that notice of intention to commence the action must be filed with the Corporation Counsel within six months after the cause had accrued. The court held that such a statute

> "• • • limits the time within which an action for negligence can be maintained against a city to one year after the cause of action therefor shall have accrued. It also requires as a condition precedent that notice of intention to sue shall have been filed with a law officer of the City within six months after such cause of action shall have accrued. Therefore, an *additional condition precedent was created* • • • *compliance with each provision had to be alleged and proved. They are independent provisions designed to conserve different objects* • • •." (Emphasis added.)

This case, affirmed by the Court of Appeals of New York and consistently followed, makes the case before the court an *a fortiori* situation in view of (a) the language in the bi-state suability legislation which specifically makes the notice of claim a "*further* condition" and (b) the fact that

it is a *jursdictional* condition and not a mere waivable limitations provision, thus invoking the rule for strict construction of immunity waivers.

A further reason exists in the statutes for keeping the two conditions separate, as the Legislatures set them forth. It will be noted that the sixty-day notice provision applies only if the suit is "for the recovery or payment of money." It would not apply in a suit for injunction, ejectment, to quiet title, for specific performance, or any other suit not for money damages. Appellant's contention therefore would establish a period of one year and sixty days for suits for money damages as against a period of one year in all other cases. This would be in the face of the single requirement of the Legislatures that suit must be commenced within one year in "*any* suit, action or proceeding."

3. Section 24 of the New York Civil Practice Act cannot enlarge the Court's jurisdiction which depends on statutory agreements between New Jersey and New York.

As we have proved in subdivisions 1 and 2 of this point, *supra*, the statutes which consent to the court's jurisdiction of suits against the Port Authority state as a primary jurisdictional condition a one-year period for the commencement of suit and these statutes must be strictly construed because they waive sovereign immunity.

The basic argument advanced by appellant in opposition is that Section 24 of the New York Civil Practice Act serves in some way as a basis for interpreting the suability legislation to extend the one-year period expressed by sixty days to offset the period of notice prior to suit.

The apparent basis for appellant's argument that C. P. A. § 24 serves this purpose is not that it is directly applicable to the bi-state suability legislation. He concedes (Brief, pp. 5, 6) that C. P. A. § 24 as a unilateral

[LETTERHEAD OF THE PORT OF
NEW YORK AUTHORITY]

LAW DEPARTMENT
Sidney Goldstein
General Counsel

March 11, 1953

Honorable George M. Shapiro
Counsel to the Governor
Executive Offices
State Capital
Albany, New York

Dear Mr. Shapiro:

We have received your request for comments and recommendation on S. Intro. 748, Print No. 781 and S. Intro. 1021, Print No. 1061, both by Senator W. Mahoney, which are before Governor Dewey for executive action.

These are two of the bills which were cleared, at your suggestion, with Mr. Kent Brown of your office prior to introduction.

S. Intro. 748 would provide for the prohibition of smoking at Air and Marine Terminals operated by the Port Authority within the State of New York.

S. Intro. 1021 would implement the memorandum of agreement executed in 1945 by the Airlines and the Port Authority, through the personal efforts of Governor Dewey, to make the definitive leases for use of New York International Airport by the Airlines enforceable in the courts.

For your convenience, I attach hereto copies of the memoranda submitted by the Port Authority to the Legislature in support of these bills.

Needless to say, the Port Authority is wholeheartedly in support of both of these bills and respectfully recommends that the Governor grant them his approval.

Very truly yours,

By: /s/ SIDNEY GOLDSTEIN
General Counsel

Enclosure

cc: Kent Brown, Esq.,
Assistant Counsel to The Governor

MEMORANDUM

In *Support* of

AN ACT

agreeing with the state of New Jersey with respect to suits against the port of New York authority upon certain leases at New York International Airport.

Through the personal efforts of Governor Dewey a renegotiation of the 1945 New York International Airport (at Idlewild) leases between the City of New York and the Airlines which were party thereto, which leases were assigned by the City, with the consent of the Airlines, to The Port of New York Authority in 1949, was brought to a successful conclusion. The Governor dictated a Memorandum of Agreement upon the principles of proposed new leases of space and services at New York International Airport which was executed by The Port of New York Authority and the United States and foreign flag Airlines at the Executive Offices, Hotel Roosevelt, New York City, on August 5, 1949.

The Memorandum of Agreement provided for the preparation of definitive leases for a 25-year term. It further stipulated that the Port Authority would join the Airlines in sponsoring legislation making these definitive leases enforceable in the courts and making the Port Authority suable upon any cause of action arising out of the Airlines' occupancy of the Airport subsequent to the execution of said leases.

Definitive leases were executed by the Port Authority and the Airlines at a ceremony presided over by Governor Dewey at the Hotel Roosevelt on January 8, 1953.

The definitive leases contain the following provision:

> "The Authority agrees that prior to February 1, 1953, it will recommend to the Governors and Legislatures of the States of New York and New Jersey the adoption of legislation, in the form annexed hereto and marked Exhibits 27 and 28 consenting to suits, actions, or proceedings by the

> Airline against the Authority. The Authority and the Airline shall jointly and actively support and sponsor such legislation until adopted."

The bill in the form called for by this provision is hereby respectfully submitted. It is requested that it be favorably reported and passed.

THE PORT OF NEW YORK AUTHORITY

By (s) AUSTIN J. TOBIN
Austin J. Tobin
Executive Director

AIRLINES NEGOTIATING COMMITTEE

By (s) O.M. MOSIER
O.M. Mosier
Vice President, American Airlines
Chairman